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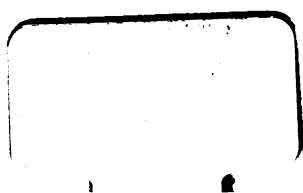
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PRINCIPLES AND PRACTICE

OF

NAVAL AND MILITARY  
COURTS MARTIAL,

WITH AN

A P P E N D I X,

ILLUSTRATIVE OF THE SUBJECT.

---

By JOHN McARTHUR, Esq.

Late Secretary to Admiral Lord Viscount Hood, &c.  
Officiating Judge Advocate at various Naval Courts Martial during  
the American War,  
And Author of "Financial and Political Facts of the Eighteenth  
and present Century."

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THE SECOND EDITION,

On an entire new Plan, with considerable Additions and Improvements,

IN TWO VOLUMES,

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L O N D O N :

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1805.

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Printer's Street.

TO  
THE RIGHT HONOURABLE  
SAMUEL LORD VISCOUNT HOOD,  
ADMIRAL OF THE WHITE SQUADRON OF HIS MAJESTY'S FLEET,  
AND  
GOVERNOR OF THE ROYAL COLLEGE OF GREENWICH,  
&c. &c. &c.

THE FOLLOWING WORK,  
CONTAINING  
THE PRINCIPLES AND PRACTICE  
OF  
NAVAL AND MILITARY COURTS MARTIAL,

IS,  
WITH ALL GRATITUDE AND RESPECT,  
MOST HUMBLY DEDICATED  
BY HIS LORDSHIP'S MOST DEVOTED

AND FAITHFUL SERVANT,

JOHN McARTHUR.

York Place, Portman Square,  
18 June 1805.



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# P R E F A C E

TO THE  
FIRST EDITION.

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IT has been the subject of regret, in his Majesty's naval service, that many branches of the profession have been so little treated upon, and explained by men whose official situations have afforded them the best opportunities of collecting information. And of all the yet untrodden paths, none surely is of greater importance than that which is the subject of the following sheets: as there is not an individual within the boards of a king's ship who must not feel himself deeply interested in the discussion of the law of Courts Martial.

The many irregularities or deviations in form, into which the members of Courts Martial are  
a 3 unknowingly

unknowingly liable to fall, more particularly on foreign stations, from want of information, and the very great injury the service has frequently sustained by loss of time in waiting for the opinions of counsel, probably on points already established; are sufficient reasons to evince the usefulness of such a treatise, and which the Author has been led to undertake partly from duty, and partly from inclination.

The several acts of parliament and printed instructions intended to regulate our naval proceedings, being in many most essential points inexplicit, and in others wholly silent, it need not excite our wonder that so many doubtful cases should have occurred, and that so many references have been necessarily made to Counsel for their opinions, particularly when we consider how unequal human wisdom is in framing of laws to provide for, and guard against every measure and variation of circumstances that may arise on all future occasions.

The Author having assiduously collected the most remarkable cases, with the respective opinions of Counsel, has arranged them, together with other original and interesting papers, in a copious Appendix, subjoined to the work; and without arrogating

gating to himself more knowledge of the subject than what may have been attained from a spirit of industry and unremitting application to his official concerns, he hopes his materials are so arranged that the reader will be enabled to draw right inferences from the authorities themselves, rather than stand in need of any comments the Author may be expected to offer on the subject.

In this place he cannot resist the desire of returning his warmest acknowledgements to those gentlemen in official situations, who have with so much civility and laudable zeal promoted his undertaking, by allowing him the perusal of many original and highly useful documents.

The Author has, besides, bestowed considerable pains and labour in consulting the highest legal authorities, as also many historical facts, illustrative of his work, which he has in every instance faithfully and accurately cited, that the Reader may have recourse to them with facility, and thence be enabled to judge of the principles advanced, and of the foundation upon which the superstructure has been erected. He has therefore been much less attentive to elegance of style and composition, than to establishing the truth of his

premises by intrinsic authorities—His aim, however, throughout, has been to treat the subject in a methodical manner and with perspicuity, to remove those difficulties which he has himself experienced in practice, and to ground, if possible, the foundation of a system which others, who have more leisure, may hereafter build upon and improve.

If, in attempting this, he may have failed in some points, and others have escaped his observation, he trusts to the candour of an indulgent Reader, who may perhaps think the Author entitled to some allowance for the difficulty of selecting and methodically arranging a mass of materials, so as to embrace compendiously and with clearness every object necessary to elucidate researches of this nature.



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# ADVERTISEMENT

TO THE

SECOND EDITION.

**I**T is now six years since the first edition of the naval part of this work has been sold off: and, notwithstanding the great demand for a new edition, the Author did not think it proper to reprint it, until he had an opportunity, by many alterations and great improvements, to make it more worthy the public eye.

It will be seen, from the former preface, that the author was the first writer who had explored the untrodden paths of naval courts martial. But, in its original form having occasionally glanced at the coincidence and variation in the naval and military practice, the work, in its then comparatively imperfect state, was often resorted to at military courts martial; although treatises on that subject had been professedly written by other authors. This circumstance, together with the suggestions of many military gentlemen of high rank, induced the author to extend his researches to the principles and practice of courts martial in both departments of  
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the King's service : and, in the prosecution of this task, he has sedulously arranged, from the old and new materials in his possession, the two systems of naval and military jurisprudence, now offered to the tribunal of the public ; wherein it has been his endeavour to exhibit the parallel superstructures, in order that their discordance and analogy, the proportions of the one to the other, and their comparative merits and defects, may be compared and ascertained.

The author has likewise, in many instances, illustrated the principles and practice of courts martial, by the common and statute law of England, as well as by the practice of civil and criminal courts of judicature. He has enlarged considerably on the rules and doctrine of evidence ; and faithfully cited a variety of new cases, on this important branch of jurisprudence.

In all doubtful cases the best legal authorities, and the works of every writer on martial or military law have been scrupulously consulted, that the inferences or conclusions might convey decision to the mind of the reader. The Author has ventured to give no decided opinion himself, unless where it has been the result of much research, and from a thorough conviction of its being founded on in-  
con-

controvertible principles of law, and the immutable principles of justice; or supported and confirmed by the authority of eminent counsel. At the same time he has anxiously studied to avoid leaving any topic touched upon in a doubtful state, or his meaning subject to vague definitions and constructions, from a want of explicitness in his mode of expression.

The undertaking was arduous; and the Author has to acknowledge his grateful remembrance of those respectable personages, who have contributed to promote and facilitate his labours. In the naval branch he was permitted by the then Lords Commissioners of the Admiralty, with that liberality of sentiment peculiar to the naval administration of the Earl of Chatham, to have access to all the records of the Admiralty. In consequence of this indulgence, he, soon after the first edition was published (1793), perused with much attention all the minutes and sentences of courts martial held in the navy under the existing laws, which are comprised in about seventy folio volumes. From those records he extracted much new matter, and prepared a chronological and alphabetical list of trials, from the commencement of the year 1750, to April 1793; which forms a part of the Appendix, and exhibits a very extensive scale of crimes and punishments, as well as many striking precedents to future Courts

Courts Martial in proportioning punishments to offences : But, for reasons to be presently noticed, he was unhappily prevented from continuing it to the present day. The Author has also to express his warmest acknowledgements to M. GREETHAM Esq. now Deputy Judge Advocate to the Fleet, for the many valuable documents kindly communicated by him on the subject of naval courts martial.

To the military profession, also, the Author is peculiarly indebted for the liberal aid which hath been afforded him. I. A. OLDHAM Esq. the Deputy Judge Advocate General with much civility, not only readily solved several of the Author's doubts and questions, but also allowed him the perusal of some interesting cases and documents ; Colonel JOHN DRINKWATER, late Deputy Judge Advocate at Bastia in Corsica, while that island continued an appendage to the Crown of Great Britain ; Major ROBERT MACNAB, formerly Deputy Judge Advocate at the Cape of Good Hope, and late of the Adjutant General's Office ; Major JOHN MACDONALD, formerly on the Staff in Egypt, now of the Quarter Master General's Office ; and GILBERT SALTON Esq. late Secretary to the Governor of Dominica and Officiating Judge Advocate in that Island ; *All*, readily furnished him with many useful precedents, new cases, and valuable information.

While

While it is gratifying to the Author thus to acknowledge the liberal assistance he has received from the military profession, it is with much pain and regret he is obliged to state the circumstances which recently precluded him from having further access to the Admiralty-records, with a view to the continuation of his extracts from April 1793, to the present period, so as to complete the original part of this work, written professedly for the naval department.

To effect this important object, he last year, when the work was in a forward state of preparation for the press, applied to the late Lords of the Admiralty, under the administration of the Earl of St. Vincent, for access to the records of courts martial; but his request was peremptorily refused. The ostensible motive will be seen in their answer to the following application :

TO W. MARSDEN Esq. Secretary of the  
Admiralty.

Sir,

York Place, Portman Square,  
13th Feb. 1804.

AS I am preparing a new edition of my Treatise on Courts Martial for the press, which has been some years out of print, and is at present in great request, I beg leave to acquaint you that,  
in

in 1793, when Sir PHILIP STEPHENS was Secretary, I had the permission of the Lords Commissioners of the Admiralty to take extracts from the court martial records of all trials under the existing laws. Having accordingly prepared a chronological and alphabetical list of trials by naval courts martial down to April 1793, specifying the nature of charges or offences, and the purport of sentences, thereby exhibiting a scale of crimes and punishments agreeably to the form annexed, I have to request you will be pleased to move their Lordships, to allow me to have access to the records, that I may be enabled to complete the said chronological list from April 1793 to the present period.

I trust that, independent of the public utility of such a list to be inserted in the appendix to my work, their Lordships may deem it an useful document, for the facility of reference to the voluminous records at the Admiralty, on the subject of naval courts martial.

I have the honour to be, Sir,

Your most obedient servant,

(Signed) JOHN M<sup>c</sup>ARTHUR.

In fourteen days afterwards he received the following answer :

Sir,

Sir,

Admiralty Office, 27th Feb. 1804.

HAVING laid before my Lords Commissioners of the Admiralty your letter of the 13th instant, I am commanded by their Lordships to acquaint you in return thereto, that, as much inconvenience may attend a permission to examine and make extracts from the records you mention, *at a period of so much business*, their Lordships do not think proper to comply with your request,

I am, Sir,

Your very humble servant,

(Signed) W. MARSDEN.

The pretext, that much inconvenience might attend the examining and making extracts from the records of courts martial, the sentences of which had all been executed, because it was *a period of much business*, is truly nugatory. Was the business of the Admiralty greater in February 1804, soon after the commencement of this war, than in beginning of 1793, when the Author formerly had access to those records? No! The business was less than at the former period. Are not the records now kept in the identical apartment in which they were formerly kept, when there was a greater press of business? And could his researches, now more than formerly, have produced in the smallest degree

degree either inconvenience or interruption to the clerks? Certainly not. But the futility of this ostensible motive is sufficiently apparent. Had the Author, as he ardently wished, been suffered to make extracts and bring down his scale of crimes and punishments to the present day, the public and the King's service might have been in the possession of much valuable additional knowledge: but his having been prevented from so completing it will not take, it is hoped, from any credit which may otherwise attach to this Publication. The injury done is to the public, not to the individual. He has, however, the gratification to think, in respect to the present Work, that he has, to the utmost of his power and abilities, endeavoured to fulfil his duty to the public, by the attainment of every *accessible* information.

The Author is, aware that many, very many, errors and imperfections may be found in this as in all other performances—*humanum est errare*; and therefore trusts he has some small claim to the favour of a Public, ever indulgent to those who manifest a spirit of industry obviously meant to be usefully and beneficially exerted.

London,  
June 1, 1805.

POSTSCRIPT.



## POSTSCRIPT.

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AFTER the lapse of so many years, since the first edition was published, the Author hoped that some abler pen would have taken up the ground which he first explored; but since this enlarged work was written and sent to press, and when its appearance was delayed by the disturbances among the pressmen, an Essay or Treatise on the Subject of Naval Courts Martial has been published by Mr. J. Delafons, in which not only the principal documents and opinions of counsel contained in the Author's former Appendix have been introduced into the body of the said Essay, but also the identical comments and observations on them have, without any acknowledgement, been most unsparingly transcribed. Although Mr. D. endeavours to qualify this proceeding, by averring that the manuscript of his work, "*was originally written and compiled in the year 1792, previous to the publication of Mr. M'ARTHUR's Treatise on the same subject;*" yet this surely cannot be a justifiable reason, after  
his

his manuscript had lain by him during thirteen years, for thus inserting in his text the principal documents in the Appendix to the Author's original work, which had cost him much pains to collect, and had, by having been given to the public, become exclusively his own; and much less will it account for his plagiarisms in servilely transcribing the Author's observations.

Notwithstanding Mr. D. acknowledges to have had thirteen years to revise and correct his manuscript, yet the essay in question bears *prima facie* evident marks of precipitation in its arrangement and composition, and it has not even an index to guide the reader to any *new or borrowed matter* which it may contain.

The transposition of original documents from an Appendix of one Author into the text of another, may indeed have some merit, provided the comments made and law authorities quoted were new; but in any view, however, this must be admitted to be an easy mode of book making!

The Author of the present publication is unwilling to appeal to the laws of his country, by a resort to the Court of Chancery. (as he has been advised)

vised) for an injunction to stop the circulation of this gentleman's work, although it be obviously a most glaring encroachment on literary property. Plagiarism seldom receives more encouragement from a discerning public than it deserves, and to this tribunal only, the Author appeals, and shall consider himself respectfully bound by its decision. He is actuated by two motives in this forbearance, 1st, his unwillingness to adopt any measure that might be deemed invidious towards an individual, who has had recourse to subscriptions in the navy for printing the publication in question: 2d, that if it were suppressed, it is probable, more favourable inferences of its merit might be drawn, than perhaps it intrinsically deserves.

The Author, however, thinks it a duty he owes to the public, to point out a few principles laid down by Mr. D. in his Treatise, which are at variance with the established theory and practice of courts martial, and if followed might lead officers into error, and be attended with consequences extremely detrimental to the service.

Mr. D. after reciting in p. 34 and 35, the 9th section; (which he calls the 7th) of the statute 22 Geo. II. c. 33, namely, " If any five or more  
of

of his Majesty's ships or vessels of war shall happen to meet together in *foreign parts*, then and in such case it shall be lawful for the senior officer of the said ships or vessels to hold courts martial, and preside thereat, from time to time, as there shall be occasion, during so long time as the said ships or vessels of war, or any five or more of them, shall continue together;" maintains, that the construction to be put on *foreign parts*, as mentioned in this section, is limited solely to the *ports of foreign princes or states*; and adds, "that in such case a court martial can be held without a particular commission for that purpose, in order that any flagrant breach of due discipline and regularity may be immediately punished, which might otherwise cast a reflection on, and lower the consequence of the British navy in the eyes of foreign princes."—On this essential point of limited construction of the statute, Mr. D. and the Author of this work are completely at issue, see page 280 of this volume, where it is incontrovertibly proved and supported by legal authorities, that the literal construction to be put on the words *foreign parts*, in the section alluded to, is to be clearly understood *his Majesty's dominions beyond the seas, including colonies or plantations, as well as the ports of foreign princes or states,*

*states*, and the invariable practice of holding courts martial, under the powers contained in said section, agreeably to this construction, puts it beyond the possibility of a doubt.

Mr. D. in p. 277 of his Essay, observes, "that when a prisoner's offence has not been proved, the Court have frequently inserted in the sentence, that the charge was *malicious* and *ill-founded*, but does not recollect such mortifying reflections have ever been cast on a prosecutor who was not subordinate and inferior to the person brought to trial."—Here again Mr. D. and the Author of this work are at complete variance; the former has given an opinion of his own, without any proof; the latter has, as in the former case, substantiated a different and more extended doctrine, and has cited several precedents on the subject. See Vol. II. pages 265, 266, and 267.

There is another instance of the incorrectness of this writer, in asserting, page 271, "That in the army a soldier *is always shot* for a military offence, as a punishment less ignominious, and more befitting a man who is continually exposing his life for the defence of his country." Whereas, it is  
the

the custom of the army to sentence soldiers, found guilty of *deserting to the enemy, or of theft, &c.* to be hanged, as the most ignominious punishment that can be inflicted ; and of which, a precedent is given in this work. See Vol. II. page 258, and Appendix, No. LXVI. Sect. 2.

London,  
June 1, 1805.

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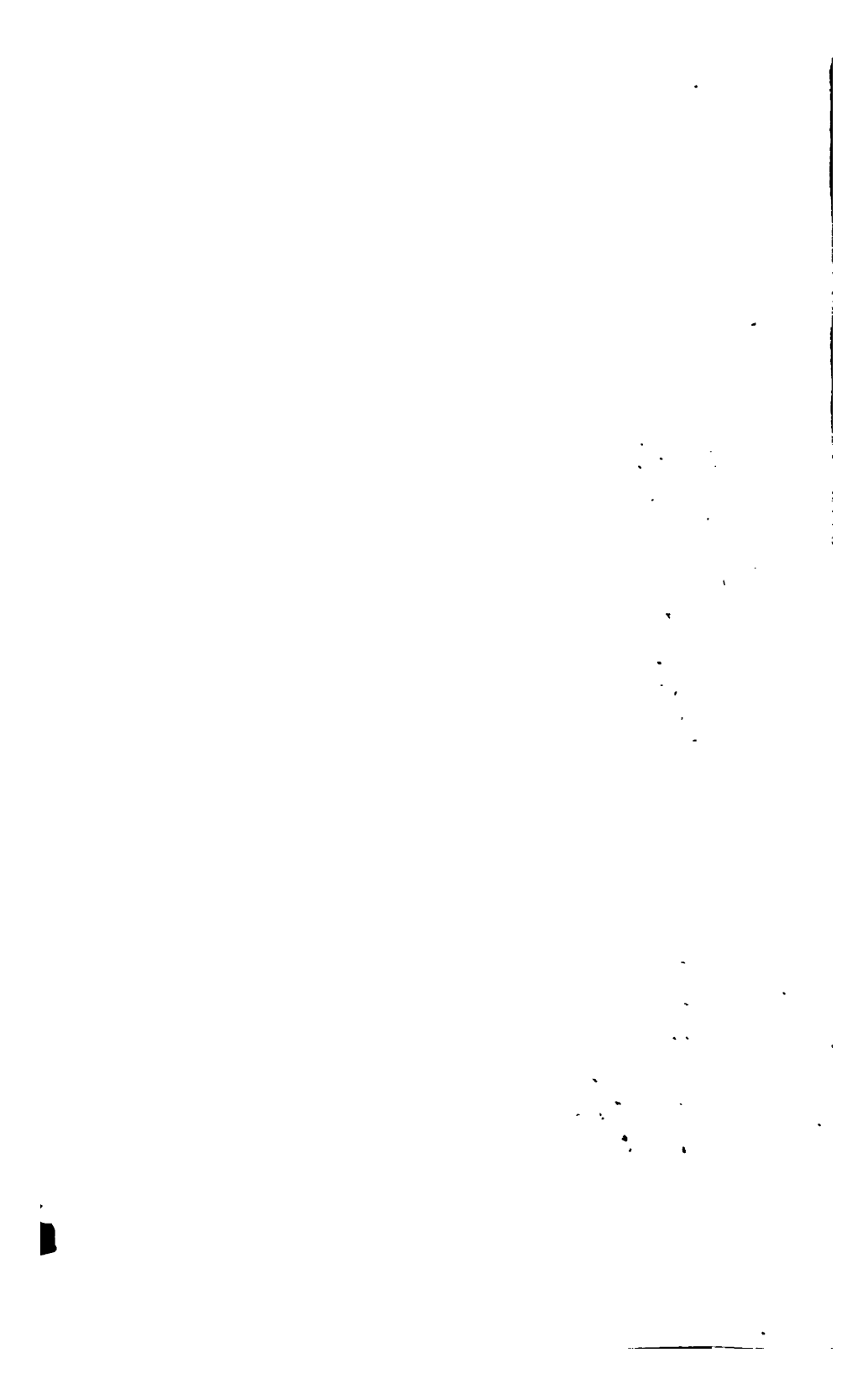
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PRINCIPLES AND PRACTICE  
OF  
NAVAL AND MILITARY  
COURTS-MARTIAL.

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BOOK I.  
OF THE FUNDAMENTAL LAWS AND ESTABLISHED  
THEORY OF NAVAL AND MILITARY  
COURTS-MARTIAL:

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CHAP. I.

*Of Laws in general.*

**L**AW (according to the definition of our learned Commentator \*), in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the law of nature and nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

\* Blackstone's Com. vol. i. page 38. 8vo. Edit. 1791.

Thus, when the Supreme Being formed the Universe, and created matter out of nothing, he impressed certain principles upon the matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, where a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law, as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

Justinian \* has reduced the doctrine of the law of nature to the three following general precepts: "That we should live honestly, should hurt no body, and should render to every man his due." The law of nature, being coeval with mankind, and derived from the Supreme Being, is superior in obligation to any other—In every clime, and on all occasions, it is binding. The validity and authority of all human laws derive their energy, power, and influence, from the fountain of the law of nature.

\* *Juris præcepta sunt hæc honestè vivere, alterum non lædere, suum cuique tribuere. Inst. lib. i. 1, 3.*

To have an adequate idea of the law of nature, we must consider man in a state of nature, unconnected with other individuals, and prior to the establishment of society. The first law of nature in order would be that of self-preservation; the next in order, although the first in importance, would be the idea of a Supreme Being, to the contemplation of which our minds are irresistibly led, in viewing the surrounding works of nature, and more particularly the harmonious motions of the celestial bodies.

The timidity and weakness, peculiar to man in a rude state, would impress him with the idea of uniting himself to others, and forming the first links of society; which would be strengthened by the reciprocal passions and affections, inspired by the two sexes; and this may be termed the third law of nature\*.

Free and isolated on the face of the earth, tired to see each other constantly in a state of warfare, fatigued with a liberty which the uncertainty of preserving rendered useless; men sacrificed a part in order to enjoy with more certainty and in peace the remainder. To form society, it was necessary to stipulate conditions; hence the origin of laws†:

\* De plus ce charme que les deux sexes inspirent par leur différence, augmentent ce plaisir, & la prière naturel qu'ils se font toujours l'un à l'autre seroit une troisième loi. *Mont. l'Esprit des Loix*, lib. i. c. ii.

† Beccaria on Crimes and Punishments, section 1.

And the expression, that the *law* is the *soul* of the state, presents a very just image; for in fact if the law be destroyed, the state becomes only a lifeless body\*.

When men have formed themselves into societies, their timidity and weakness cease. Separate states and nations, entirely independent of each other, arise by slow gradations. Mutual intercourse takes place; each society, or independent state, will endeavour to turn circumstances to its own advantage; jealousies, disputes, and even hostilities, will often ensue: hence the origin of the "*law of nations*†," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities; in the construction of which compacts, we have no other rule to resort to but the law of nature, being the only one to which all the communities are equally subject; and therefore the civil law very justly observes, that "*quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*"

The law of nations, or *droit des gens*‡, is naturally founded upon this principle, that different nations,

\* Demosth. ap. Stob. Serm. 41. p. 276.

† Blackstone's Com. vol. i. sect. 2. Edit. 1791.

‡ *Le droit des gens*, est naturellement fondé sur ce principe, que le diverse nations, doivent se faire dans la paix le plus de bien.



## COURTS-MARTIAL

nations, during the time of peace, ought to do each other all the service they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.

Prior to the epocha of the first Theban \* war, we find only the dawnings of military art, with scarcely a trace of the law of nations; prior to that period Greece had only beheld bands of men, not foldiers, suddenly over-run a neighbouring country, and retire after committing a few hostilities, and transient acts of cruelty †. In the war of Thebes, different nations first associated in the same camp, and were united under one general, braving with equal courage the rigours of the seasons, the tediousness of a siege, and the perils of daily combats. In the sally ‡ of the Thebans, when besieged by the Argives, Adrastus, the Argive general, was unable to bestow funeral honors on those brave leaders who fell in battle, until Thexis was obliged to interpose his authority to constrain Crion to submit to the law of nations, then beginning to be introduced §.

bien, & dans la guerre le moins de mal qu'il est possible sans nuire à leurs véritables intérêts. *Mont. L'Esprit des Loix, lib. i.*

c. 3.

\* Barth. Intro. to Anacharsis, vol. i. p. 45.

† Pausan. lib. ix. c. ix. p. 728.

‡ Barth. Intro. to Travels of Anacharsis, vol. i.

§ The year 1329 before Christ.

## NAVAL AND MILITARY

In the early dawnings of commercial intercourse among different states, we find traced the leading features of an important branch of the law of nations, now denominated the law merchant, or *lex mercatoria*.

In all maritime questions, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature \*, this law is regularly and constantly adhered to; likewise in all disputes relating to prizes, to shipwrecks, to ransoms, &c. There is no other rule of decision, but this great universal law; collected from history and usage, from such writers of all nations and languages, as are generally approved and allowed of.

The principal offences against the law of nations, animadverted on as such by the municipal law of England, are of three kinds. 1st. Violation of Safe Conducts, or Passports: 2d. Infringements of the Rights of Ambassadors: And, 3d. Piracy.

The Athenians, on more occasions than one, had the insolence to avow, that the only law of nations they were acquainted with was † force. And though it was a general law in Greece, that a foreign power was not to intermeddle in the differences between a mother country and her colonies, yet this law, in the age of Pericles, was in-

\* Black. Com. b. i. chap. vii. & b. iv. c. v. Edit. 1791.

† Thucyd. lib. iii. c. lxxxix.

fracted by the Athenians, in sending succours to the Corcyrians, in their revolt from Corinth, and which excited a war against them by the Lacedæmonians, Corinthians, and other allies \*.

In modern times, similar infractions of the law of nations have produced similar effects; and the recent instance with our American colonies, supported by a confederacy of foreign powers, must transmit to posterity, in proper colours, an abhorrence of the violation of those rules of law, resulting from principles of natural justice, and which, among states, constitutes the *law of nations*.

Municipal, or civil law †, is that by which particular districts, communities, or nations are governed, being thus defined by Justinian ‡; *Jus civile est quod quisque sibi constituit*.

It is understood to be a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.

An ancient writer observes, that a nation which applies itself to maritime affairs, inclines towards a democracy ||; and it was this idea which pro-

\* Travels of Anacharsis. Intro. v. i. p. 365.

† Black. Com. v. i. sect. 2. Edit. 1791.

‡ Just. I. ii. 1.

|| Arist. de Rep. lib. vi. c. vii.

duced in Solon a preference to the popular form of government at Athens.

The executive power of the laws of England, being lodged in the king, gives birth to all those advantages of strength and dispatch so peculiar to monarchical governments—the wisdom of aristocratical, and the public virtue or good intention of democratical government: these three governments are employed in compounding and uniting, as into one, the legislative body of this kingdom. These three distinct powers, thus aggregated and actuated by different springs, and attentive to different interests, compose the British Parliament, which has the supreme disposal of every thing; and each branch being armed with a negative power, a nice equilibrium is kept up, by means of which nothing can be attempted that is repugnant to the interests of the constitution.

It has been observed by an intelligent \* writer, to whose learned work I have already referred the reader, that nature is almost always in opposition to the laws: because she labours only for the happiness of the individual, without regard to the other individuals who surround him, while the laws only direct their attention to the relations by which he is united to them; and because she infinitely diversifies our characters and inclinations,

\* Barthelemi's Travels of Anacharsis, v. iv. p. 15.

while

while it is the object of the laws to bring them back to unity. The legislator, therefore, whose aim is to annihilate, or at least to reconcile, those contrarieties, must consider morals as the most powerful spring, and most essential part of the political institutions. He must take the work of nature at the first moment she has produced it; retouch its forms and proportions, and soften, without entirely effacing, its great outlines, till at length he has converted the independent man into the free, but united citizen.

What Sir William Blackstone \* applies to the law of civil states, or political union, may be applicable likewise to military or martial law: for a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intended to act together as one man. If it therefore be to act as one man, it ought to act by one uniform will; but, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the

\* Commentaries, v. i. p. 52. Edit. 1791.

will of one man, or of one or more assemblies of men, to whom the supreme authority is intrusted ; and this will of the one man, or assemblage of men, is, in different states, according to their different constitutions, understood to be law.

Hence, in all states, general rules and orders are established for the information and direction of all persons, either in civil or military capacities, whether of positive or negative duties, in which the boundaries of right and wrong, and the manner of enforcing these rights, and redressing these wrongs, are precisely ascertained.

But, all punishment, for which there is not an absolute necessity, becomes tyrannical, says the great Montesquieu ; or, in other words, every act of authority exercised by a man upon another man, is tyrannical, unless it be absolutely necessary. The necessity of defending the depot of public safety, against the usurpation of individuals, is therefore the foundation of the right of punishing\*.

The laws alone can fix the punishment of crimes, and the right of enacting laws is confined to the

\* Great commanders, both in ancient and modern times, have occasionally tarnished their military glory, by giving way to passion and prejudices, and exercising acts of tyranny and oppression. Pausanias, the Lacedæmonian general, and the conqueror at Platea, was accused of tyranny and oppression, and deprived of his command. Afterwards, on proofs of his treason, he was put to death. *Thucyd. lib. 1. c. cxxxi.*

legislature,

legislature, as representing the whole society united by the social contract. No magistrate, as making one of the society, can with justice inflict a punishment on any other member of the society, unless such punishment be already prescribed by the law. Were it otherwise, it would be in effect adding a new punishment to that which is already defined, and what no zeal or pretext for the public good can authorize \*. *Ubi lex incerta ibi lex nulla.*

Although the military and naval branches of different states make greater sacrifices to their natural liberty, than the other classes of the community, yet the laws by which they are regulated, while subordinate to the power of one man, are, in general, clearly defined, and framed upon the wisest and most unequivocal principles, so as to promote and maintain the honour and glory of their state.

The articles of war, and rules of discipline for the British service, by sea and land, are clear and explicit; commanding what is right, and prohibiting what is wrong, with the punishment and penalty of every transgression annexed.

They likewise embrace the three essential component parts, necessary to constitute every law, viz. 1st. *Directory*; as enjoining the subject to

\* Beccaria on Crimes and Punishments, sect. 2 and 3.

observe the regulations, and to abstain from the commission of wrongs or crimes: 2d. *Remedial*; as indicating the means of obtaining redress, in case of being wronged, injured, or oppressed: 3d. *Vindictory*; implying the punishment or penalty to be inflicted on, or incurred by, such as are guilty of transgressing the rules laid down.

Although many able writers have fully discussed the subject of *rewards* and *punishments* in criminal law \*, and while they have done honor to the cause of humanity and benevolence, by applauding those who have displayed a greater desire to reward for the prevention of crimes, than to inflict a punishment upon the authors of them for their reformation; yet our ablest legislators, who have united the theory of jurisprudence with the practical knowledge of civil and military life, have transmitted to us the strongest arguments in favour of mandatory and compulsory laws; since rewards in their nature can only persuade and allure, and we find nothing is compulsory but punishment. And of all the parts of a law, the most effectual, says Sir William Blackstone, is the *vindictory*; for it is but labour lost to say, "Do this, or avoid that," unless we also declare, "This shall be the consequence of your non-compliance."

\* Lord Coke, Beccaria, &c.



## C H A P. II:

*Of the Origin of Courts Martial, and the Authority by which they are constituted.*

THE source of martial law in England is derived from the court of chivalry, or martial's court ; but to ascertain the period to which the origin of the courts of chivalry may be traced, is a task extremely difficult, and in which ancient historians differ essentially. The imperfect records transmitted to us of the important events, emigrations, wars, systems of laws, and forms of government, peculiar to rude and illiterate ages, and to which we must refer for the origin of those courts, must render researches of this nature extremely embarrassing, and in the end prove but unsatisfactory.

We find, however, in the simplest and rudest ages, natural and artificial distinctions to have constituted an important part of the mechanism of society. The natural distinctions of young and old, parent and child, husband and wife, as well as the artificial ones introduced among mankind, in separating the bold and skilful warrior, uniting  
vigour

vigour of body to energy of mind, from those whose feebleness of body and intellects render them unequal to dexterity and valour, must have been introduced at the early formation of society.

As the boundaries of society are extended, and its form rendered more complicated by the invention of arts, subordinate distinctions of rank will be naturally introduced, and different modes of military discipline will produce different distinctions among warriors.

No subordinate distinction stood so conspicuous, in the improvements made in the military art, as the dexterous management of horses, and the training of them to the evolutions of war. In Greece, Rome, and the monarchies of Asia, as well as among the savage warriors of Scythia and Germany\*, peculiar honors were bestowed on those who distinguished themselves in the cavalry; hence it is reasonable to infer, that, at very remote periods, courts of *chivalry*, or *marshall's* courts†, were introduced among nations, and that distinguished marks of honor were then, as in more recent times, conferred on the commanders of the cavalry.

In the reign of Henry VIII. we find that Sir Thomas Knevet, the master of the horse, com-

\* Tacitus de Moribus Germanorum.

† CHIVALRY: *Chivalerie*, Fr. knighthood; from *Cheval*, a horse. The word *Marshall* is derived from the Saxon *Mare*, a horse; and *Schall*, a governor.

manded the Regent, a capital ship sent to the assistance of Sir Edward Howard, lord high admiral; then scouring the French coast\*.

So high was the esteem for the naval service in the days of Queen Elizabeth, that we find, from the lists of the fleet, there was but one private gentleman at that time a captain, all the rest being lords and knights. In the time of Oliver Cromwell, the Dutch and other maritime nations of Europe followed the same example, in the memorable action between the British and Dutch fleets, July 1653, after the lieutenant general and admiral van Tromp commanding the latter was killed: or, the States of Holland elected in his room the Lord Opdam, who had been a colonel of horse in their service, and of good conduct and personal worth, whom, in imitation of the English, they chose to the sea employment†.

If we ascend to more remote periods of the history of our country, we will find that the kings of England, in ancient times, commanded their fleets in person; and that King Arthur vindicated the dominion of the seas, making ships of all nations salute our ships of war, by lowering the top-sail and striking the flag, and in like manner the forts upon land. This duty of the flag, which hath

\* Campbell's Ad. vol. i. p. 281.

† Chronicle of the Civil Wars of England, Scotland, and Ireland, 349.

been constantly paid to our ancestors, served to impress foreigners with reverence and respect for our maritime power and jurisdiction.

King Edgar styled himself Sovereign of the Narrow Seas ; and having, as Selden informs us\*, fitted out a fleet of four hundred sail of ships in the year 937, sailed about Britain with his mighty navy; and, arriving at Chester, was there met by eight kings and petty princes of foreign states, who had come to do him homage. Among these petty kings there was one Maccufus, called King of Man and of very many Islands, who, with the other seven kings, in acknowledgement of Edgar's sovereignty, rowed this monarch in a boat down the river Dee, himself steering the boat; and he is reported to have said to his lords attending him, that "then his successors might boast themselves kings of England, when they should enjoy so great a prerogative of honors".

The title which Edgar used, ran thus : "I Edgar, sovereign lord of all Albion, and of the maritime or insular kings inhabiting round about †."

Canute enforced with rigor the ancient Danish tribute called Danegelt, imposed by his predecessor

\* Selden's *Mare Clausum*, or the Right and Dominion of the Sea. b. ii. cap. x.

† Selden's *Mare Clausum*, b. ii. c. xii.

Ethelred, for guarding the seas and the sovereignty of them.

Egbert, Althred, and Elthred, kept up the dominion and sovereignty of their predecessors; nor did the succeeding princes of the Norman race wave these pretensions, but maintained the right to the four adjacent seas surrounding the British shore; the honor of the flag king John challenged, not merely as a civility but a right to be paid *rum debitâ reverentiâ*, and the persons refusing he commanded to be treated as enemies; and the same was ordained not only to be paid to whole fleets bearing the royal standard, but, to those ships of privilege that wore the Prince's ensign or colours of service. This decree was confirmed and bravely asserted, by a fleet of five hundred sail, in a royal voyage to Ireland; wherein he compelled all the vessels he met with in his way, in the eight circumfluent seas, to pay that duty and acknowledgement, which has been maintained by our kings to this day, and was never contested, unless by those who attempted the conquest of the kingdom.

In the times of the feudal association, we find the greatest veneration paid to the institution of chivalry. The usual appearance of a knight in the field was on horseback, attended by an Esquire. The chief strength of armies consisted of cavalry. The skilful management of a horse was, in consequence, one of the great accomplishments of a

knight or a warrior. This way of thinking characterized some of the German tribes, even in the age of Tacitus \*.

We find little mention of courts of chivalry in England, prior to William the Conqueror; who established in England a supreme court, under the direction of a chief justiciar, composed of the great officers of state, and called the *Aula Regis*, in which was blended the jurisdiction of the court of chivalry, or marshal's court, and at which the constable and earl marshal presided in all matters of honor and arms, determining according to the law military, and the law of nations †.

But Edward I. finding that the *Aula Regis* was obnoxious to the people, and dangerous to the government, new modelled and subdivided its power and authority into separate courts. Hence the court of chivalry was created, with a separate jurisdiction, over which the constable and marshal presided: The steward of the household presided over another, instituted to regulate the king's domestic servants: The high steward, with the barons of parliament, formed an august tribunal, for the trial of delinquent peers: The court of Chancery issuing all original writs, under the great seal, to the other courts: The Common Pleas being allowed to determine all causes between private subjects: The Exchequer managing the king's revenue; and the

\* De Mor. Germ. c. xxxii. † Black. Com. b. iii. c. v. Ed. 1791.

court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts; and particularly the superintendence of all the rest, by way of appeal, and the sole cognizance of pleas of the crown, or criminal causes\*.

The court of chivalry† was considered as a military court, or court of honour, when held before the earl marshal only; and as a criminal court, when held before the lord high constable of England, jointly with the earl marshal. And then it had jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it; but the criminal, as well as civil part of its authority, is fallen into entire disuse, there having been no permanent high constable of England (but only, *pro hac vice*, at coronations and the like) since the attainder and execution of Stafford duke of Buckingham, in the thirteenth year of Henry VIII. The authority and charge, both in war and peace, being deemed too ample for a subject; so ample, that when the chief justice Fineaux was asked by King Henry VIII. how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England‡.

\* Black. Com. b. iii. c. iv. Ed. 1791.

† 4 Inst. 123.—2 Hawk. P. vi. 9.

‡ Duck. *de Autoritate Jur. Civ.*—Bl. Com. b. iv. c. xix. sect. 4.

It would not be consistent with the limits of this work to discuss at large the extensive jurisdiction of the court of chivalry, as first instituted in England ; neither would it be satisfactory to the reader to detail the various statutes by which its power and authority was, by gentle gradations, curtailed, abridged, and, in a manner, annulled.

From the time of the court of chivalry being abridged of its criminal jurisdiction, until after the restoration of Charles II, no regular court, for the administration of martial law in the navy or army, appears to have been established. By the statute 13 Car. II. c. 9. express rules, articles, and orders were first enacted by authority of parliament, for the better keeping up a regular discipline in his majesty's navy, intituled, *An act for establishing articles and orders for the regulating and better government of his majesty's navies, ships of war, and forces by sea* : And in the 22 George II. c. 23. intituled, *An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his majesty's ships, vessels, and forces by sea*, the preamble sets forth, that the several laws relating to the sea service, made at different times and on different occasions, have been found by experience not to be so full, so clear, so expedient, or consistent with each other as they ought to be. For amending and explaining the said laws, and for reducing them into one uniform act of parliament, the said act of 13 Car. II. c. 9. was, with the fol-



lowing intermediate ones, repealed ; viz. so much of an act passed in the second year of the reign of king William and queen Mary, intituled, *An act concerning the commissioners of the admiralty* : And also so much of an act passed in the sixth year of the reign of king George the First : Also, part of the act passed in the eighth year of the reign of king George the First, intituled, *An act for the more effectual suppressing of piracy* : Also, an act passed in the eighteenth year of the reign of George the Second, intituled, *An act for the regulating and better government of his majesty's navies, ships of war, and forces by sea ; and for regulating the proceedings upon Courts Martial in the sea service* : And also, an act passed in the twenty-first year of the reign of his majesty George the Second, intituled, *An act for further regulating the proceedings upon Courts Martial in the sea service ; and for extending the discipline of the navy, to the crews of his majesty's ships wrecked, lost, or taken ; and for continuing to them their wages, upon certain conditions.*

By the said act 22 Geo. II. c. 23. all the former acts enumerated were not only repealed, but by that act, and the recent one of the 19 Geo. III. c. 17, they have been altered, amended, and new modelled, and contain, with proper modifications, all the rules, articles, and orders for the regulating and better government of his majesty's ships, vessels, and forces by sea, whereon (as the preamble of the act expresses) under the good providence of

God, the wealth, safety, and strength of this kingdom chiefly depend\*.

By the statute 13 and 14 Car. II, c. 3. intituled, *An act for ordering the forces*, the military power of the crown was solemnly recognised, and the preamble of the statute declares that, "within all his majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia and of all forces by sea and land, and of all fortifications and places of strength, is, and by the laws of England ever was, the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either of the houses of parliament cannot, nor ought to pretend to the same; nor can, nor lawfully may raise or levy any war, offensive or defensive against his majesty, his heirs, or lawful successors, &c."

In the early part of the reign of William and Mary, in consequence of several British regiments having shewn strong symptoms of disaffection to the new government, arising from the jealousy excited in the minds of the troops, by the marked preference the king was supposed to manifest on all occasions to the Dutch troops; and a dangerous

\* Vide Abstract of the Articles of War, contained in the act of 22 Geo. II. c. 23; Appendix, No. I.; Also sections of Courts Martial, Statutes, Ap. No. II.

spirit of mutiny pervading the British regiments then at Ipswich, under order of embarkation for Holland, and outrageous acts of violence having been absolutely committed by the soldiers of the Scottish regiment of Dunbarton, formerly commanded by the duke of Monmouth, who openly declared their adherence to the abdicated prince; the authority of parliament in such a crisis was resorted to by the king, that proper measures might be adopted to check the mutinous spirit of the army, as well as to punish in a legal and summary manner the mutineers.

An act was accordingly passed (April 1689) for punishing mutiny and desertion, &c. which was to continue in force no longer than six months. This was the first regular mutiny act, and it was renewed again in the month of January following, and, from that period till the present, has, with the exception of a single interruption of three years only, viz. in king William's reign, from April 1698 to February 1701, been annually renewed by parliament, and has, as well in times of peace as of war, undergone, at various periods, many essential alterations and amendments.

In the naval articles, contained in the act  
 • 22 Geo. II, almost every possible offence is set down, and the punishment annexed, in which respect the seamen have much the advantage over their brethren in the land service, whose articles of war

are not enacted by parliament, but framed from time to time at the pleasure of the crown; which, with regard to military offences, hath a sole and almost absolute legislative power. For, by the mutiny act annually passed, for punishing mutiny and desertion, and for the better payment of the army, and their quarters, "his majesty may form, make, and establish articles of war, and constitute courts martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same\*," which articles shall be judicially taken notice of by all judges, and in all courts whatever; but it is at the same provided, "that no officer or soldier shall, by such articles of war, be subjected to any punishment extending to life or limb, for any crime which is not expressed to be so punishable by the mutiny act." This, Sir William Blackstone observes†, is a vast and important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by the mutiny act.

It cannot however escape the military reader's observation, that the annual consent of parliament being requisite to pass the mutiny act, by which the king is empowered to frame articles of war

\* Mutiny Act, (1804.) Sect. 18 and 19.

† Black. Com. b. i. c. xiii. Ed. 1791.

for the government and discipline of the army, the very existence of such army must therefore depend on this annual act of the legislature; and, although practically it may be considered a standing army, as not being annually disbanded, yet theoretically it is no more than an army whose existence is sanctioned annually, in peace or in war, by the two houses of parliament and the will of the sovereign. The Bill of Rights declares a standing army in time of peace, if with the consent of parliament, to be legal and constitutional.

A power is given to the lords of the admiralty over the marines, by an annual act passed "for the regulation of his majesty's marine forces while on shore," similar to the annual mutiny act; vesting a power in the crown to form articles of war, and constitute courts martial.

And, by the 19th section of the mutiny act (1804), officers of marines may be associated with officers of the land forces, for the purpose of holding courts martial, as often as it shall be expedient, and particularly in certain cases wherein the marine forces may be interested; taking rank according to the seniority of their commissions in either service.

The king is likewise empowered by parliament to frame and establish articles of war, for the regulation

gulation and government of the troops in the service of the East India Company \*. And it is declared, by the mutiny act, that, when and as often as there may be occasion, officers of his majesty's land forces, and those in the East India Company's service, may sit in conjunction at courts martial, and proceed upon the trial of any officer or soldier in like manner, and to all intents and purposes, as if such courts martial were composed of officers of the land forces, or of officers in the service of the said Company; with this distinction, that, upon the trial of any officer or soldier in the service of the said East India Company, regard shall be had to the regulations and provisions made in the 27th year of Geo. II, for punishing mutiny and desertion of officers and soldiers, in the service of the East India Company †.

That no doubt may remain respecting the power of trying artillery officers, or those serving in the royal corps of engineers, the mutiny act declares, that the officers and persons serving and hired to be employed in the royal artillery, and in the several trains of artillery, and all officers serving, or who shall serve in the corps of royal engineers, and all officers and persons serving in the corps of

\* Stat. 27 Geo. II. c. 9.

† Mutiny act (1804) sect. 20. and Art. of War, sect. 22.

royal military artificers and labourers; and all master gunners and gunners, who now are or shall be under the ordnance, shall be at all times subject to all the penalties and punishments mentioned in the act\*. And, by the articles of war, all officers, &c. in the royal artillery are subject to be tried by courts martial, in like manner as the officers and soldiers of his majesty's other troops. For differences arising among themselves, or in matters relating solely to their own corps, the courts martial may be composed of their own officers; but where a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, the officers of artillery shall sit in courts martial with the officers of other corps, taking rank according to the dates of their respective commissions.

In like manner, also, all officers serving in the corps of royal engineers, and all officers and persons serving in the corps of royal military surveyors and draftsmen, or in the corps of royal military artificers and labourers, and all master gunners and gunners under the ordnance, are equally subject to trial by courts martial as officers and soldiers of the other troops†.

The mutiny act also declares, that all troops raised in any of the British provinces of America,

\* Mutiny act (1804), sect. 82.

† Articles of War (1804), sect. 20.

by authority of the respective governors or governments of the same, shall, while acting in conjunction with his majesty's British forces, under the command of an officer having a commission immediately from his majesty, be liable to martial law and discipline, in like manner as his majesty's other forces are, and shall be subject to the same trial and punishments by courts-martial\*.

By the stat. 26 Geo. III. c. 107. sect. 68. it is enacted, that, during such time as the militia shall be assembled for the purpose of being trained and exercised, all the clauses, provisions, matters, and things contained in any act then in force, for punishing mutiny and desertion, &c. shall be in force with respect to the militia, and all officers, non-commissioned officers, and privates of the same, in all cases whatsoever; but that no punishment shall extend to the loss of life or limb. And, by section 88, it is further enacted, that every adjutant, serjeant-major, serjeant, corporal, drum-major, and drummer of the militia, shall at all times be subject to the mutiny act and articles of war: And that it shall be lawful for the commanding officer, or colonel of any regiment of militia, to direct the holding of courts martial whenever the regiment is embodied, for the trial of the forefaid persons, for any offence committed during the time the regiment was not embodied; under the re-

\*Mutiny act, sect. 83. and Articles of War, sect. 73.



striction before mentioned, with respect to the extent of the punishment.

It is further enacted, by section 99, That no officer serving in the militia shall sit at any court martial, upon the trial of any officer or soldier serving in any of his majesty's other forces; nor shall any officer, in any of his majesty's other forces, sit in any court martial, upon the trial of any officer or private man serving in the militia.

It is also enacted, by the same statute \*, which is the last act that reduces into one all the laws relating to the militia, that, in all cases of actual invasion or imminent danger thereof, and in all cases of rebellion or insurrection (the occasion being first communicated to parliament if then sitting, or, if not sitting, published by proclamation) it shall be lawful for his majesty to order the militia to be embodied, and put under the command of such general officers as he shall appoint, and to be led into any part of the kingdom; and that all the officers and soldiers thereof shall at such times be subject to the whole clauses and provisions of the mutiny act, in all cases whatsoever.

By the act for consolidating and amending the provisions of the several acts relative to corps of

\* 26 Geo. III. cap. 107.

yeomanry and volunteers in Great Britain (passed June 5, 1804), it is enacted, that such of the adjutants, serjeant majors, drill serjeants, and serjeants, serving in any corps of yeomanry or volunteers, as receive the constant pay of their rank, and all trumpeters, bugle-men, and drummers, serving in any corps and receiving any pay as such therein; and also all farriers, being attested, and receiving any such pay therein, shall, at all times, be subject to any act for punishing mutiny and desertion, and to the articles of war, and shall be liable to be tried, for any crime committed against such act or articles of war, by any general or detachment or regimental court martial, according to the nature of the offence, in like manner as adjutants, &c. of the militia forces; provided that every such court martial shall be composed wholly of officers of the yeomanry or volunteer establishment; and that no punishment by such court martial shall extend to life or limb, except when called out in cases of invasion, or appearance of an enemy upon the coast.

No officer of any corps of yeomanry or volunteers shall sit on any court martial, on the trial of any officer or soldier of his majesty's other forces; nor shall any officer, in any of his majesty's other forces, sit on any court martial on the trial of any officer, non-commissioned officer, drummer, trumpeter, or private man, in any corps of yeomanry or volunteers. All officers in corps of yeomanry or volunteers,

lunteers, having commissions from his majesty, or others authorized for that purpose, shall rank with the officers of the regular and militia forces, as the youngest of their respective ranks.

By the statute 18 Henry VI. c. 19. desertion from the king's armies, by sea or land, is made felony; and, by statute 5 Eliz. cap. 5. extends to mariners; and the offence is liable to be tried by the justices of every shire or county. The same statute punishes other inferior offences with fines, imprisonment, and other penalties.

These statutes, although in a manner superseded by those enacting courts martial, are still standing laws of the land, never having been abrogated or repealed by any subsequent act of parliament. And, between the periods of passing these acts, and those passed in the reigns of Charles II. and William and Mary, already noticed, for regulating naval and military courts martial, we find, in history, frequent instances of the extraordinary prerogative of the crown, proclaiming martial law in the kingdom; more particularly in the reigns of queen Mary, queen Elizabeth, and Charles the First. This prerogative, from usage, is justifiable at all times, upon particular emergencies of the state, when restrained within proper limits, and not made with a view of being subservient to the exercise of arbitrary power.

Military law, as exercised by the authority of parliament, and the mutiny act annually passed, together with the articles of war framed by his majesty, and the printed regulations from time to time issued for the regulation of his majesty's troops, has often been confounded by able lawyers and writers on military law, with a different branch of the royal prerogative denominated martial law, and which is only resorted to upon an emergency of invasion, rebellion, or insurrection.

The broad line of distinction, between military and martial law, has been ably defined by the late Earl of Roslyn, then Lord Chief Justice of the Common Pleas and afterwards Lord High Chancellor of England, in the case of Serjeant Grant's motion, in the Court of Common Pleas, for a prohibition against the sentence of a general court martial, by which he was adjudged to receive a thousand lashes, for the crime of having been instrumental in the inlisting, for the service of the East India Company, two drummers, knowing them at the same time to belong to the Foot-Guards \*. His lordship, in delivering the opinion of the court on this important trial, entered so learnedly and clearly into the merits of the case, and marked so nicely the distinction between military and martial law, as exercised formerly and in present times, that we

\* See the case reported, Trinity Term 1792.

have

have deemed it proper to give his ideas on the subject at length, in a subsequent chapter, and which have been faithfully extracted from the Trinity Term Reports, June 1792 \*.

In this place, however, it may be necessary to observe, that the military law is subordinate to the civil and municipal laws of the kingdom, and does not in any way supersede those laws, but that they materially aid and co-operate with each other, for the good order and discipline of the army in particular, and for the benefit of the community in general. Thus, it is declared by the mutiny act, that "nothing in that statute shall extend or be construed to exempt any officer or soldier whatsoever from being proceeded against by the ordinary course of law." And that if any officer, soldier, &c. shall be accused of any capital crime, or any offence against the person, estate, or property, of any of his majesty's subjects, which is punishable by the known laws of the land, the commanding officers of all regiments, troops, or parties, are required to use their utmost endeavour to deliver over such accused person to the civil magistrate, and to assist the officers of justice in apprehending such offender; and this, under the penalty of being *ipso facto* cashiered, and declared incapable of holding any civil or military office within

\* Vide chap. iv.

the united kingdom of Great Britain and Ireland, or in his majesty's service \*.

"The delinquencies of soldiers," as the learned Chief Justice † observes, "are not triable here, as in most countries in Europe, by martial law; but generally, where they are offenders against the civil peace, they are tried by the common law; therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain. But there is, by the providence and wisdom of the legislature, an army established in this country, of which it is necessary to keep up the establishment. The army being established by the authority of the legislature, it is an indispensable requisite of that establishment, that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army."

On the other hand, the civil power occasionally contributes its aid when necessary to the military, particularly in cases not falling within the military jurisdiction, such as apprehending

\* Mutiny act (1804) sect. 12. and 13.

† The late Earl of Roislyn.

deserters,

deserters \*, and compelling the appearance of witnesses †.

Martial law is proclaimed by authority of parliament, and prevails generally or partially in a kingdom for a limited time, as at present in Ireland, for the suppression and extinction of the rebellion which has so long unhappily existed. The authority under which martial law is exercised, when it prevails in its full extent, claims a jurisdiction in summary trials by courts martial, not only over all military persons in all circumstances; even their debts are subject to inquiry by a military tribunal; and every species of offence, committed by any person who appertains to the army, is tried

\* By the mutiny act (1804), sect. 67, it is declared lawful for any constable, headborough, or tythingman, of any town or place, to apprehend, or cause to be apprehended, any person reasonably suspected to be a deserter, and to bring him before a justice for examination, when, if either by the party's confession, or by the testimony on oath of one or more witnesses, or the justice's own knowledge of the fact, the suspected person is found to be an enlisted foldier, the justice is authorised to commit him to gaol, and give notice thereof to the Secretary at War, that he may be proceeded against according to law. And by the section 68, any justice of the peace may likewise issue his warrant for the payment of a reward of twenty shillings, for the apprehending of every such deserter, to be paid out of the land-tax money of the parish in which he is apprehended. And, by section 69, heavy penalties are enacted against all who conceal deserters, assist their escape, or receive, buy, or exchange their arms or clothes.

† Mutiny act (1804), sect. 18.

not by the civil judicature, but by the judicature of the regiment or corps to which he belongs. But it also extends to a great variety of cases not relating to the discipline of the army, but relative to that state which subsists by military power ; as plots against the sovereign, intelligence to the enemy ; which are all considered as cases within the cognizance of the military authority.

The statute, for putting in execution martial law, usually gives a power to arrest or detain in custody all suspected persons, and to cause them to be brought to trial in a summary manner by courts martial, and to execute the sentence of all such courts, whether of death or otherwise ; and declares, moreover, that no act done in consequence of those powers, shall be questioned in any of the king's ordinary courts of law ; and that all who act under the authority of such statute shall be responsible for their conduct in the same, only to such courts martial.



*Of the fundamental Laws by which Naval and Military Courts Martial are governed.*

**M**ARTIAL law in the navy, as has been observed, was first reduced to certain fixed rules and articles by the authority of parliament, soon after the Restoration\* but since new modelled and altered by statute 22 Geo. II. c. 23. to remedy some defects which were of fatal consequence in conducting the preceding war, intituled, *An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his majesty's ships, vessels, and forces by sea*†; and by the late statute 19 Geo. III. c. 17. this act is farther explained and amended. And, for the government and discipline of the military class, by statute 13 and 14 Car. II. c. . . and by the mutiny act first passed in the reign of William and Mary, April 1689, and from that period annually renewed by parliament, his majesty was vested with power to form articles of war, and constitute military courts martial.

\* 13 Car. II. stat. 1. c. ix. See abstracts of these acts,  
App. No. I. and No. II. with  
the amendment, 19 Geo. III.  
† 22 Geo. II. c. xxiii. c. xvii. f. 3,

By the amended mutiny act it is now declared, "That it shall and may be lawful, to and for his majesty, to form, make, and establish articles of war for the better government of his majesty's forces, which articles shall be judicially taken notice of by all judges and in all courts whatsoever\*."

By a subsequent section it is declared†, "That, for bringing offenders against such articles of war to justice, it shall and may be lawful to and for his majesty to erect and constitute courts martial, as well as to grant his royal commissions or warrants for convening courts martial, with power to try, hear, and determine any crimes or offences by such articles of war, and to inflict penalties by sentence or judgement of the same, as well within the kingdom of Great Britain and Ireland, as in Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, as in his majesty's garrison of Gibraltar, and in any of his majesty's dominions beyond the seas. And, by section 26 of the mutiny act, it is provided always, that no officer or soldier shall, by such articles of war, be subjected to any punishment extending to life or limb, within the kingdom of Great Britain, Ireland, Jersey, Guernsey, &c. for any crime which is not expressed to be so punishable by this act, nor for such crimes as are expressed to be so punishable in

\* Mutiny act (1804), sect. 24.

† Ibid. sect. 25.

any manner, or under any regulations which shall not accord with the provisions of this act."

Hence, on a superficial view of the mutiny act and military articles of war, it would appear that no crime is punishable by a military court martial in any other way, than in that which these articles specially direct. But his majesty, having besides the power at all times to make and issue regulations for the army, gives a more extensive authority to military courts martial than is apparent on a first consideration of the limitations and literal import of the mutiny act and articles of war. The printed regulations therefore, which are from time to time issued by his majesty, and promulgated in the army the same as the standing general printed instructions in the navy, have the effect to embrace all inferior offences, and to which a court martial may inflict corresponding punishments, independent of the major ones of life and limb.

There are offences in the army and navy to which no specific punishment is annexed by the articles of war; but it is left to the discretion of a court martial to discriminate the shades of guilt, and to inflict a punishment proportionate to the offence, not affecting life or limb. Thus, it is declared by the mutiny act, "that it shall be lawful for courts martial, by their sentence or judgement, to inflict corporal punishment, not extending to

life or limb, on any soldier for immoralities, misbehaviour, or neglect of duty."

The acts already noticed, for the government of his majesty's ships, vessels, and forces by sea, contain not only the 36 articles of war, in which almost every possible offence is explicitly set down, and the punishment thereof annexed, or left to the discretion of a court martial, but also, sundry clauses of express rules and orders for assembling and holding courts martial for the trial of any of the offences specified therein. By 31 Geo. II. cap. 10. sect. 33. a competent number of printed copies of the articles of war, together with an abstract of all the clauses of the said statute, intitled, "An act for the encouragement of seamen employed in the royal navy, and for establishing a regular method for the punctual, frequent, and certain payment of their wages, and for enabling them more easily and readily to remit the same for the support of their wives and families, and for preventing frauds and abuses attending such payments," are directed to be delivered to the captain or commander of every ship or vessel, who is to cause them to be hung up and affixed to the most public places of the ship, and to have them constantly kept up and renewed, so that they may be at all times accessible to the inferior officers and seamen on board, and likewise to observe, that such abstract be audibly and distinctly read

over, once in every month, in the presence of the officers and seamen, immediately after the articles of war, are read ; hence it is, that no officer or seaman is allowed to plead ignorance of the penalties and punishments to which he is liable, from neglect or disobedience, nor can he be unacquainted with the encouragements and benefits to which seamen are entitled, by a due and faithful performance of their duty.

The military articles ordain, in the last section, that " all the rules and articles are to be read and published once in every two months at the head of every regiment, troop, or company, mustered or to be mustered in the service ; and are to be duly observed and exactly obeyed by all officers and soldiers who are, or shall be in the military service, excepting in what relates to the payment of soldiers quarters, and to carriages, which is, in Ireland, to be regulated by the lord lieutenant, or chief governor or governors of that part of the united kingdom of Great Britain and Ireland ; and in the islands, provinces, and garrisons beyond the seas, by the respective governors of the same, according as the different circumstances of the said part of the united kingdom, and of the said islands, provinces, or garrisons may require \*."

It may not be improper, in this place, to take a cursory view of the different offences specified

\* Military articles annexed to mutiny act (1804), sect. 24, art. 5.

in the naval and military articles of war, together with the punishments annexed to each; and at the same time, to examine the analogy they bear to the criminal laws of the land, denominated "the doctrine of pleas of the crown;" in order that members of courts martial, being thus furnished with the principles and grounds of decision in the courts of law, may the better be enabled to judge of the comparative punishment proper to be inflicted for offences committed, particularly when the matter is left discretionary to the court; and, in the prosecution of this task, we shall endeavour to point out all ambiguous constructions that may be put upon any of the articles.

Most writers on criminal jurisprudence have laid it down generally that the true measure of a crime is the damage it does to society. There are some crimes which tend directly to the destruction of society, or to those who represent it. Some are prejudicial to the particular safety of men, by attacking their life, property, or honor. And others are actions contrary to what the law prescribes or forbids, with respect to the public good. The first class of crimes are the most serious, and the worst are such as affect the executive power of the king and his government. The crimes, against lives and property, merit also the severest punishments prescribed by law.

The

The crimes cognizable by naval or military courts martial may be divided into felonies and misdemeanors; or, more properly, into capital offences, and offences only criminal and not capital. Felony is defined to be an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt \*.

The true criterion of felony is forfeiture; for, as Sir Ed. Coke justly observes, in all felonies which are punishable with death, the offender loses all his lands in fee simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only †.

The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them, and to this usage the interpretations of the law do now conform. And therefore, if a statute makes any new offence felony, the law implies that it shall be punished with death, viz. by hanging, as well as with forfeiture; unless the offender prays the benefit of clergy, which all felons are entitled once to have, provided the same is not expressly taken away by statute ‡.

\* 4 Black. Com. c. vii. p. 95. Edit. 1791. † 1 Inst. 391.

‡ 1 Hawk. P. C. 107. 2 Hawk. 444.

The offences, comprehended and specified in the naval as well as military articles of war, may, for the sake of perspicuity, be classed or distributed, nearly in a similar manner, under the following general heads: 1st, Those that are immediately against God and religion: 2dly, Such as affect the executive power of the state, or infer a criminal neglect of the established articles and rules of discipline in his majesty's service: 3dly, Such as violate or transgress the rights and duties which are owing to individuals or fellow subjects: and 4thly, Offences in themselves strictly military, and such as are peculiarly the object of martial law.

1st, Against God and religion, are classed those relative offences contained in the 1st and 2d of the naval articles, viz. neglecting public worship and being guilty of profane oaths, cursing, execrations, drunkenness, uncleanness, or other scandalous actions; the punishment of which is left to the discretion of the court martial.

Although the higher offence of blasphemy be not particularized in these articles, yet it is unquestionably implied, by the words profane oaths, cursings, and execrations. This offence, according to Mr. Hawkins, is punishable at common law by fine and imprisonment, or other infamous corporal punishment\*; and by the statute of 19 Geo. II. c. 21.

\* Hawk. Pleas, c. vii,

which



which repeals all former articles made against profane and common swearing, every labourer, sailor or soldier, convicted before a justice of the peace of profanely swearing or cursing, shall forfeit one shilling\*; every other person, under the degree of gentleman, two shillings; and every gentleman, or person of superior rank, five shillings, to the poor of the parish; and on second conviction double, and for every subsequent offence treble the sum first forfeited, with all charges of conviction; and, in default of payment, shall be sent to the house of correction for ten days †.

All blasphemies against God, or the christian religion, or the holy scriptures, are indictable at

\* By sect. 1. art. 1. of the Military Articles, any non-commissioned officer or soldier behaving indecently or irreverently at divine worship, shall for his first offence forfeit one shilling.

† Black. Com. b. iv. c. iv. p. 66. Edit. 1791. Voltaire, in his Commentary on crimes and punishments, mentions that Lewis IX. king of France, who for his virtues was numbered among the saints, made a law against blasphemers. He condemned them to a new punishment; their tongues were pierced with a hot iron. It was a kind of retaliation; the sinning member suffering the punishment.

The ordinance of Lewis XIV. declares that, "those who shall be convicted of having sworn by or blasphemed the holy name of God, of his most holy mother or of his saints, shall, for the first offence, pay a fine; for the second, third, and fourth, a double, triple, and quadruple fine; for the fifth shall be put in the stocks; for the sixth shall stand the pillory and lose his upper lip; for the seventh shall have his tongue cut out" This law appears to be humane and just, as it inflicts a cruel punishment only on a several repetition, which can hardly be presumed.

common

common law, as well upon the stat. 9 & 10 W. 3. c. 32. after mentioned. So are all impostors in religion, such as falsely pretend to extraordinary missions from God, or terrify or abuse the people with false denunciations of judgments. These last, if the act be done with intent to make any public disturbance, are, by the stat. 5 Eliz. c. 15. punishable, for the first offence, by a fine of 10 l. and one year's imprisonment; and for the second, by imprisonment for life and a forfeiture of all the offender's goods and chattels; one moiety to the crown, and the other to any person who shall sue for the same\*. In like manner all malicious revilings, in public derogation and contempt of the established religion, are punishable by the common law, inasmuch as they tend to a breach of the peace. Similar to these are all scandalous and open breaches of morality exhibited in the face of the people; such as was the conduct of one who exposed himself naked to the public view from a balcony in Covent Garden†. Offences of this kind sap public morals, the necessary foundation of good government; and are therefore properly cognizable by the temporal magistrates, who may punish the offenders by fine, imprisonment, and such other corporal punishment as the circumstances may require.

By statute 4 Ja. I. cap. 5. drunkenness is punishable at common law, by forfeiture of five shillings,

\* 1 Hawk. c. v. 3 Bac. Abr. 474. 4 Black. Com. 59. 62.

† Sir Charles Sedley's case, 1 Sid. 168. 2 Strange 790.

or the fitting six hours in the stocks \*. Uncleanneſs, and other ſcandalous actions againſt religion and morality, are cognizable by the temporal courts, and puniſhed with fine and imprifonment †.

Under our firſt diviſion of offences in the order propoſed, may be comprehended the following articles in the military code, viz. ſection 1. art. 1. ordains “that all officers and ſoldiers, not having juſt impediment, ſhall diligently frequent divine ſervice and ſermon, in the places appointed for the aſſembling of the regiment, troop, or company to which they belong; ſuch as wilfully abſent themſelves, or being preſent, behave indecently or irreverently ſhall, if commiſſioned officers, be brought before a court martial, there to be publickly and ſeverely reprimanded by the preſident; if non-commiſſioned officers or ſoldiers, every perſon ſo offending ſhall for his firſt offence forfeit twelve pence, to be deducted out of his next pay; for his ſecond offence he ſhall not only forfeit twelve pence, but be laid in irons for twelve hours, and for every like offence ſhall ſuffer and pay in like manner; which money ſo forfeited ſhall be applied to the uſe of the ſick ſoldiers of the troop or company to which the offender belongs.”

By article 2. of the ſame ſection it is ordained, “that no officer or ſoldier ſhall uſe any unlawful oath or execration under the penalty expreſſed in the firſt article.”

\* Black Com. b. iv. p. 64. Edit. 1791.

† Ibid. b. iv. p. 65.

Art. 3. ordains "that whatsoever officer, non-commissioned officer, or soldier, shall presume to speak against any known article of the christian faith, shall be delivered over to the civil magistrate to be proceeded against according to law."

Art. 4. ordains "that whatsoever officer, non-commissioned officer, or soldier, shall profane any place dedicated to divine worship, or shall offer violence to a chaplain of the army, or to any other minister of God's word, shall be liable to such punishment as by a general court martial shall be awarded."

Art. 5. ordains "that no chaplain who is commissioned to a regiment, or garrison, shall absent himself from the said regiment or garrison (excepting in case of sickness, or leave of absence), upon pain of being brought to a court martial and punished as their judgement and the circumstances of his offence may require."

Article 6. ordains "that whatsoever chaplain to a regiment, or garrison, shall be guilty of drunkenness, or of other scandalous or vicious behaviour derogating from the sacred character with which he is invested, shall, upon due proof before a court martial, be discharged from his office."

The second division of crimes consists of such as affect the executive power of the king and his government : and this division may be subdivided  
into

into the offences specified in the 3d, 4th, 5th, 15th, 16th, 19th, 20th, 22d, 24th, 25th, 27th, and 31st articles of war, for the navy; viz. holding intelligence with an enemy or rebel—concealing letters or message from, or relieving an enemy or rebel—deserting to an enemy—running away with ships, stores, or yielding the same to an enemy—desertion from the service, or entertaining deserters—waste or embezzlement of stores—mutinous assemblies—seditious or mutinous words—concealing any traiterous or mutinous designs, &c.—striking, quarrelling with, or disobeying the orders of a superior officer—sleeping upon the watch, neglecting duty, or forsaking a station allotted, and knowingly signing false muster books.

In the military articles of war, our second division of crimes falls under the following sections and articles; viz. section 1, art. 1, 2, 3, 4, & 5. Traiterous or disrespectful words against the king, or any of the royal family—contemptuous or disrespectful behaviour towards the general, or other commander in chief—mutiny or sedition, not endeavouring to suppress the same, or coming to the knowledge of any mutiny, or intended mutiny, and not without delay giving information thereof—striking or drawing any weapon against a superior officer, or disobeying orders.

Section 4, articles 1, 2, 3, 4 & 5. Musters and returns to be regularly made as directed.

Section 6, articles 1, 2, 3, 4 & 5. Desertion—receiving and entertaining deserters.—inlisting in another regiment, &c.—absenting from a troop or company.

Section 7, articles 1, 2, 3, 4 & 5. Provoking speeches or gestures—giving or sending a challenge—suffering any person to go forth to fight a duel—upbraiding another for refusing a challenge.

Section 13, article 1, selling or embezzling military stores. Section 14, art. 15, holding correspondence with, or giving intelligence to the enemy, either directly or indirectly.

By the laws of England \* if a man be adherent to the king's enemies, giving them aid and comfort in the realm, or elsewhere, he is declared guilty of high treason. This must be proved by some overt act; as by giving them intelligence, by sending them provisions, or selling them arms, &c. †

By stat. 2 & 3 Ann. cap. 20, sect. 34, it is enacted, that if any officer or soldier shall, out of England, or upon the sea, correspond with any rebel or enemy, or give them advice or intelligence, by letters, messages, signs, tokens or otherwise, or shall treat or enter into any condition with them, without authority so to do, he shall be guilty of high treason. And, by the general mutiny acts, for these and other like offences, the offender shall

\* Black. Com. b. iv. c. vi. Edit. 1791. † 3 Inst. 10.

suffer death, or such other punishment as a court martial shall award.

The ancient statute law likewise notices another important class of offences connected with those above mentioned, and to which in recent times it has been found expedient to give additional strength and energy, by an act passed in the reign of his present majesty.

By the stat. 23 Elizabeth cap. 1, " If any one shall have or ~~pretend~~ to have power, or shall by any ways or means put in practice, to absolve, persuade, or withdraw a subject from his natural obedience to the crown, or to withdraw him, for that intent, from the religion established by the queen's authority within her dominions, to the romish religion, or to move him to promise any obedience to any pretended authority of the see of Rome, or of any other prince, state, or potentate, to be had or used within the queen's dominions, or shall do any overt act to that intent or purpose ; or if any person shall by any means be willingly absolved, or withdrawn as aforesaid, or willingly be reconciled, or shall promise obedience as aforesaid ; every such person, his procurers, and counsellors thereunto, being thereof lawfully convicted, shall suffer, and forfeit as in cases of high treason."

It seems, the bare pretending to such a power, without any further endeavour to persuade persons

from their allegiance, or the bare endeavour so to persuade, without pretending to such power, is within the act \*.

By s. 3. of the same act, aiding or maintaining of such offenders, knowing the same, or concealing any such offence for 20 days after knowledge thereof, without disclosing the same to some justice of peace, or other high officer, is made misprision of treason.

In later times the same species of offence has taken another and not a less perilous shape; and it hath been found necessary to pass an act for the better prevention and punishment of attempts to seduce the army and navy, from their duty and allegiance to his majesty. For which purpose, the stat. 37 Geo. 3. c. 70. has enacted, "that any person who shall maliciously and advisedly endeavour to seduce any person serving in the king's forces, by sea or land, from his duty and allegiance to his majesty, or to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on conviction of such offence, be adjudged guilty of felony without benefit of clergy." And by s. 2. any such offence, whether committed in England or on the high seas, may be tried before any court of oyer

\* 1 Hawk. ch. xvii. s. 78.

and



and terminer or gaol delivery, for any county in England, as if the offence had been therein committed : provided (f. 3.) that no person, tried and acquitted or convicted under this act, shall be liable to be tried again for the same offence or fact, as high treason or misprision of treason ; nor shall this act prevent the trial of any person as for high treason, or misprision of treason, who has not been tried for the same fact under this act.

The naval articles of war make no distinction between an enemy and a rebel, but the common law does ; and the crime of giving intelligence, or relieving a rebel, is only considered in the same light with that of an enemy, when given to our own fellow-subjects in actual rebellion at home \*. But to relieve a rebel, fled out of the kingdom, is no treason ; for the statute is taken strictly, and a rebel is not an enemy ; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England †.

By the statute law, deserting to an enemy is made felony without benefit of clergy, and even extends to any subject of Great Britain enlisting himself in any foreign service ‡. Embezzeling or destroying the king's warlike stores, to the value of twenty shillings, is likewise made felony without benefit of clergy, by statute 22 Car. II. c. 5. —

\* Foster, 219. † 1 Hawk. P. C. 38. ‡ 29 G. II. c. xvii.

And, by statute 12 Geo. III. c. 24. burning or destroying any of his majesty's ships of war, or any of the king's arsenals, magazines, &c. or military or naval stores, or ammunition, or aiding, abetting, or assisting in such offence, is declared to be felony without benefit of clergy.

Desertion from the king's armies in time of war, whether by land or sea, in England, or in parts beyond the sea, is, by several ancient statutes, and particularly by the statutes 18 Hen. VI. c. 19. 7 Hen. VII. c. 1. 3 Hen. VIII. 5, and 5 Eliz. c. 5. made felony, and, under certain circumstances, without benefit of clergy; and this is extended to mariners and gunners serving in the navy. And the statute 2 and 3 Ed. VI. c. 2. renewed by stat. 4 and 5 Will. and Mary, c. 23. takes away clergy generally from deserters in times of war: And the offence is made triable by every justice of the shire. These statutes are also levelled against some other inferior military offences, which are punishable as misdemeanors, but they are altogether fallen into disuse, as well on account of the manner of retaining soldiers, therein referred to, being no longer adopted, as, because, since the annual acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained. By the stat. 1 Geo. I. c. 47. if any person (other than enlisted soldiers, who are already punishable by law for such offence) shall, in Great Britain, Ireland, Guernsey, or Jersey,

sey, persuade or procure any soldier to desert, he shall forfeit 40l. to be recovered by any informer ; and, if he have not property to that amount, or, from the heinous circumstances of the crime, it shall be thought proper, the court, before whom he is convicted, shall imprison him not exceeding six months, and also adjudge him to stand in the pillory for one hour in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed, By §. 2. the prosecution must be commenced within six months after the offence.

Desertion, (says Montesquieu \*) in our days, was grown to a very great height, in consequence of which, it was judged proper in France to punish those delinquents with death, and yet their number did not diminish. The reason is very natural ; a soldier, accustomed to venture his life, despises or affects to despise the danger of losing it ; he is also habituated to the fear of shame, and it would have been therefore much better to have continued a punishment †, which branded him with infamy for life : the punishment was intended to be increased, while in reality it was diminished.

Mankind (as he observes) must not be governed with too much severity ; we ought to make a

\* Mont Spirit of Laws, book vi. c. xii.

† The punishment here alluded to, formerly inflicted in France on a deserter, was sitting his nose, or cutting off his ears.

prudent use of the means, which nature has given us to conduct them. If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments.

The crime of desertion among the Athenians was punished with death, for to desert was to betray the state \*. As a mitigated punishment they were sometimes bound with cords and whipped, as Demosthenes reports, but had their hands likewise cut off, as we are informed by Suidas †.

Desertion by the Romans was punished with death in time of war, but more mildly in time of peace.

By the mutiny act it is ordained, that officers or soldiers, who shall mutiny or stir up sedition, or shall desert his majesty's service, shall suffer death, or such other punishment as a court martial shall award. It is also declared, that any non-commissioned officer or soldier, enlisted or in pay in any regiment, troop or company, who shall, without having first obtained a regular discharge

\* Pet. leg. att. 563.

† Potter's Ant. of Greece, b. iii. c. xxii. Charondas, the lawgiver of the Thurians, enacted, that deserters should be compelled to sit three days in the market place clothed in female dresses; and this law, says the historian, excelled the provisions of other lawgivers on the same subject, both in humanity and wisdom. *Diod. Sic. l. xii. c. xvi.*

there-

therefrom, enlist himself in any other regiment, &c. shall be deemed to have deserted his majesty's service, and shall in like manner suffer death, or such other punishment as by a court martial shall be awarded, and may be punished as such in the corps in which they last enlisted \*.

It is further enacted and declared, that, in the case of any non-commissioned officer or soldier, tried and convicted of desertion, where the court shall not think the offence deserving of capital punishment, they may, instead of awarding a corporal punishment, adjudge the offender to be transported as a felon for life, or for a certain term of years, and if he return without proper authority before the expiration of the term limited, he shall suffer death as a felon, without benefit of clergy †.

The military articles of war declare, that "whatsoever officer, non-commissioned officer, or soldier, shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as, by the sentence of a general court martial shall be awarded ‡." It is also declared, that "a soldier or non-commissioned officer enlisting himself in any other regiment, troop or company, without a regular discharge from the regiment, troop, or company in which

\* Mutiny act (1804), s. 1, 2, 3.

† Ibid. sect. 4.

‡ Military articles of war, sect. 6. art. 5.

he last served, is held to be desertion, and punishable as such; and the accessaries to this offence are deemed almost equally guilty with the principals, it being declared, that in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he the said officer so offending shall, on being convicted thereof before a general court martial, be cashiered."

By the mutiny act it is further declared, "that any person who shall knowingly detain, buy, or exchange, or otherwise receive from a soldier or deserter, or any other person, upon any account or pretence whatsoever, any arms, clothes, caps, or other furniture belonging to the king, or cause the colour of any such clothes to be changed; the person so offending shall, on conviction before any justice of the peace, by the oath of one or more credible witnesses, forfeit for every such offence, the sum of five pounds, to be levied by distress and sale of the goods and chattels of such offender; and in case there should not be sufficient goods and chattels, he is to be committed to the common gaol, there to remain, without bail, for three months; or be publicly whipped at the discretion of the justice \*."

\* Mutiny act (1804), sect. 69.

Hence we perceive that the crimes of harbouring soldiers, being deserters, purchasing their arms, clothes, caps, or other furniture belonging to the king, are punishable, in virtue of the mutiny act, either by a military or civil tribunal. If the offender be a person subject to military jurisdiction, he will of course be tried at a general court martial; but if in the civil line of life, and not amenable to martial law, the remedy and punishment is left to a civil tribunal.

The offences relating to mutinous assemblies, sedition, &c. are punished by the articles of war with death; or otherwise, as a court martial shall think fit. By stat. 22 Geo. II. cap. 33. sect. 19. sentences of death by naval courts martial, in cases of mutiny, may be put in execution, within the narrow seas or on foreign stations, without reporting the proceedings of the court martial either to the lords commissioners of the admiralty, or to the commander in chief abroad, where such sentence was passed. But no sentence of death, for other crimes specified in the articles of war, can be put in execution till after the report of the proceedings of the said court shall have been made to the lords commissioners of the admiralty, or to the commander of the fleet or squadron in which the sentence was passed, and their or his directions shall have been given therein. Upon a competent consideration of this subject it will appear, that to annex the *ultimum supplicium* without delay to offences,

offences, which have in themselves a tendency to subvert the laws and discipline of the king's service, is a measure highly expedient, and not attended with that severity so frequently attributed to it.

The reasonableness of this doctrine will strike us the more forcibly, when we consider that, by the laws of England, offences of a nature somewhat analogous are frequently punished with death. For, by several statutes, the punishment of the riotous assembling of twelve or more persons, and their not dispersing by proclamation, may be capital, according to the circumstances that attend such unlawful assembly\*.

By the military articles of war it is declared, that any officer, non-commissioned officer or soldier, who, being present at any mutiny or sedition, shall not use his utmost endeavour to suppress the same, or, coming to the knowledge of any mutiny or in-

\* 3 and 4 Ed. VI. c. . first made it high treason : and by 1 Mar. ft. 2. c. 12. made felony, but within the benefit of clergy. 1 Geo. I. cap. 5. makes it felony without the benefit of clergy, and indemnifies the peace officers, and their assistants, if they kill any of the rioters in endeavouring to suppress such unlawful assembly. By the military articles of war (1804) sect. 7 art. 4. all officers, of whatever condition, have power to quell all riots, quarrels, frays, and disorders, though even among the officers or soldiers of other regiments ; and that by ordering the officers into arrest, or non-commissioned officers or soldiers to prison, until their proper superior officers shall be acquainted therewith.



tended mutiny, shall not without delay give information thereof to his commanding officer, shall suffer death, or such other punishment as by a general court martial shall be awarded \*."

The severity of the first branch of the twenty-second article of war for the navy, by inflicting the punishment of death, without mitigation, has frequently, and perhaps on reasonable grounds, been animadverted on by naval and military officers, particularly by the latter whose articles, having a view to the frailties and passions of men, give, for the same crime, a discretionary power to a general court martial to inflict death, or such other punishment as shall seem meet, according to the circumstances of criminality which may appear against the offender in the course of his trial. The naval article alluded to declares, that, "if any officer, mariner, soldier, or other person in the fleet, shall strike any of his superior officers, or draw, or offer to draw, or lift up any weapon against him, being in the execution of his office, on any pretence whatsoever, every such person being convicted of any such offence, by the sentence of a court martial, shall suffer death."

But when we consider the infirmities inseparable from human nature, and which abound even in the most upright hearts—the unguarded moments of passion, which at times no prudence or circum-

\* Military Articles of War, sect. 2. art. 4. —By a law of Solon's, all persons who remained neuter at any mutinous or seditious assembly, were declared infamous. *Plutarch's Life of Solon.*

*specimen can govern, and the numberless unforeseen causes which may suddenly arise amidst the fluctuating humours and caprices of mankind, it is devoutly to be wished, that, on a legislative revision of this article, a discretionary power may be vested in a court martial to inflict death, or such other punishment as the crime, from the palliating circumstances attending it, shall merit.*

Under our third distribution of the general head of offences, are those that violate and transgress the rights and duties which men owe to their fellow-subjects, and which cannot be committed without a manifest violation of the laws of nature, of the moral as well as political rules of right, under which may be classed murder, sodomy, and robbery, &c.\*

There are no specific articles in the military code for the punishment, by courts martial, of the crimes just noticed, which fall under our third division of the naval articles. But the mutiny act and military articles provide a general remedy, for capital crimes of this or of a similar nature. It is provided, that nothing contained in the mutiny act shall extend, or be construed to exempt, any officer or soldier whatsoever, from being proceeded against by the ordinary course of law†. And it is further provided, by the mutiny act and articles of war‡, that if any officer, non-commissioned officer,

\* Articles of War, 27, 28, 29. App. No. I.

† Mutiny act (1804), sect. 13.

‡ Ibid. sect. 14. and Articles of War, sect. 11, art. 1.

or soldier, shall be accused of a capital crime, or of any violence or offence against the person, estate, or property of any of his majesty's subjects, which is punishable by the known laws of the land; the commanding officer and officers of every regiment, troop, company, or party is and are required to use his and their utmost endeavours to deliver over such accused person to the civil magistrate, and shall also be aiding and assisting to the officers of justice, in apprehending and securing the person or persons so accused, in order that he or they may be brought to a trial. And, if any such commanding officer shall wilfully neglect or refuse, upon application made to him for that purpose, to deliver over such accused person or persons to the civil magistrates, or to be aiding or assisting to the officers of justice in apprehending such offenders; every such officer so offending, and being thereof convicted before any two or more justices of the peace for the county where the fact is committed, by the oath of two credible witnesses, shall be deemed and taken to be *ipso facto* cashiered, and shall be utterly disabled to have or hold any civil or military office or employment, within the united kingdom of Great Britain and Ireland, or in his majesty's service; provided the said conviction be affirmed at the next quarter sessions of the peace for the said county, and a certificate thereof be transmitted to the Judge Advocate in London, if such conviction shall be affirmed in Great Britain, or to the Judge Advocate in Dublin, if such conviction shall be affirmed in Ireland; and the said Judge Advocates respectively  
in

London or in Dublin are hereby obliged to certify the same to the next court martial which shall be holden in London or in Dublin respectively. And by the articles of war, sect. xi. art. 1. it is ordained that, "the officer or officers so offending shall, upon being convicted thereof before a general court martial, be cashiered."

The criminal laws of England, as well as our naval and military codes, annex to the crime of murder capital punishments. But as many of our readers may probably confine their ideas of homicide to the two grand divisions of *murder* and *excusable homicide*, we think it proper to notice, with as much brevity as the importance of the subject will admit, the several distinctions and gradations of guilt attending acts of homicide; that the proportionate enormity of the most aggravated guilt and the faintest shades of absolute innocence, as comprehended in the penal law of England, may be perfectly understood.

Felonious homicide is divided into *murder* and *manslaughter*. There are other degrees of homicide which do not amount to felony, but are either *justifiable* or *excusable*. Justifiable homicide, *ex necessitate*, is subdivided into the following classes: 1. In advancement of justice.—2. In execution of justice.—3. In defence of person and property.

Excusable homicide is classed under two heads: 1. Chance medley.—2. Misadventure. These subdivisions refer to several other classes too minute to be noticed

noticed in this work at full length, but which refined distinctions are attended to in courts of law, in discriminating the degrees of guilt, and in proportioning the punishment to the offence.

*Murder*, in the sense in which it is now understood, is the killing of another person, with malice pre-pense or a forethought, either express or implied by law. The sense, of the word malice, is not confined to a particular ill will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malò animo*, where the fact has been attended with such circumstances, as carry in them the plain indication of a heart regardless of social duty, and fatally bent on mischief; and therefore malice is implied from any deliberate cruel act against another, however sudden\*.

The grosser instances of *murder*, where the depravity of the heart or malice above mentioned is apparent, form the first classes of cases under this head—2. Where an officer, or one who assists in the advancement of justice, is killed in the regular discharge of his duty—3. Where a private man, lawfully interfering to prevent a breach of the peace, is opposed in such his endeavour and slain—4. Where death happens incidentally in the profe-

\* Foster, 256. Kel. 121. 124. 126, 127. 3. Inst. 52.

cution of some other felony—5. Where it happens from other unlawful acts, of which death was the probable consequence, done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately fall where it may; though the death ensue against, or beside the original intent of the party: and 6. From deliberate duelling\*.

Drunkennes voluntarily contracted, though it be a temporary madness, is no excuse for murder in the law of England; indeed it is rather considered as an aggravation than a palliation of criminal conduct, which proceeds on an idea, that one crime ought not to be privileged by another†.

*Manſlaughter* is thus defined ‡, the unlawful killing of another without malice, either expreſs or implied; which may be either voluntarily upon a sudden heat, or involuntarily, but in the commiſſion of ſome unlawful act. Theſe were called in the gothic conſtitution, *Homicidia vulgaria quæ aut caſu, aut etiam ſponte committuntur, ſed in ſubitaneo quodam iracundiæ calore et impetu* ||. Hence, in manſlaughter, there can be no acceſſaries before the fact; becauſe it muſt be committed without premeditation.

\* Eaſt's Pleas of the Crown, v. i. p. 215.

† Black. Com. vol. iv. p. 25. ‡ 1 Hale, P. C. 466.

|| Stierah. *de jure Goth.* lib. iii. c. iv.

The cases falling under the head of manslaughter, are either, 1st, Where death ensues from actions in themselves unlawful, but not proceeding from a malicious or felonious intention: 2d, From actions in themselves lawful, but done without due care and circumspection, for preventing mischief: 3d, Where death ensues upon a sudden combat or affray: or, 4th, From heat of blood, upon a reasonable provocation given.

If, upon a sudden quarrel, two persons fight, and one of them kill the other, this is voluntary manslaughter; and so it is if they, upon any occasion, go out and fight in a field—for this is one continued act of passion\*. So also, if a man resent the provocation of being pulled by the nose, and immediately kill the aggressor, it is not murder, for there is no previous malice in it; but it is manslaughter†. There is another species of provocation, which, though it do not amount to a personal assault upon the party himself, is yet of so grievous a nature as the law reasonably concludes cannot be borne in the first transport of passion; where the injury is irreparable and can never be compensated. This is where a man finds another in the act of adultery with his wife; in which case, if he kill him in the first transport of passion, he is only guilty of manslaughter, and that too of the

\* 1 Hawk. P. C. 82.

† Kelyng, 135. 4 Black. Com. 191.

lowest degree. It is therefore usual for the court to direct, in such a case, the burning of the hand to be gently inflicted, because there could not be a greater provocation\*. But in this, and in every other case of homicide, if there be sufficient time for passion to subside, and reason to interpose, it amounts to murder†.

Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures, without any assault upon the person; nor is any trespass against lands or goods. This rule governs every case where the party killing, upon such provocation, made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm‡.

It must not, however, be understood, that any trivial provocation, which in point of law amounts to an assault, or even that a blow, will of course reduce the crime of the party killing to manslaughter. This we know has been supposed by some writers, but there is no authority for it in the law. For, where the punishment inflicted for a slight transgression of any sort, is outrageous in its nature, either in the manner, or in the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabo-

\* Foster, 296. 1 Hale, 486. † Foster, 296.

‡ Foster, 290. 1 Hale, 455. 1 Hawk. c. xxxi. sect. 33.  
lical



lieal malignity, than of human frailty : it is one of the true symptoms of what the law denominates malice, and therefore the crime will amount to murder notwithstanding such provocation\*. Bar, barity, says Lord Holt, in Keate's case, will often make malice,

The case of *Stedman* will illustrate this, in both points of view. The prisoner, who was a soldier, was indicted for the murder of a woman, named *Macdonel*. It appeared, that a friend of the deceased being fighting with another in Covent Garden, and the prisoner running towards them, the woman said to him, " you will not murder the man, will you ?" *Stedman* replied, " what is that to you, you bitch," upon which, the woman gave him a box on the ear, and then *Stedman* struck her with the pomel of his sword on her breast ; thereupon she fled, and he pursued and stabbed her in the back with his sword. It seemed to Holt, C. J. that this was murder ; the box on the ear, by the woman, not being a sufficient provocation for the killing her in that manner, and after he had given her the blow in return for the box on the ear : and it was agreed to have this found specially by the opinion of all the judges thereon. But, it afterwards appearing in the progress of the trial, that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden

\* Foster, 291. 4 Black. Com. 199, 201.

clearly to be only manslaughter. The smart of the wound, says Mr. Justice Foster, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact\*.

If, on any sudden provocation of a slight nature, one beat another in a cruel and unusual manner, so that he dies, though he did not intend to kill him, it is murder by express malice†.

In the case *Rex v. Taylor* ‡, it appears that three Scotch soldiers were drinking together in a public house; some strangers in another box abused the Scotch nation, and used several provoking expressions towards the soldiers; on which one of them, the prisoner, struck one of the strangers with a small rattan cane, not bigger than a man's little finger. The stranger went out for assistance; and, in the mean time, an altercation ensued between the prisoner, and the deceased, who then came into the room, and who, on the prisoner's offering to go without paying his reckoning, laid hold of him by the collar, and threw him against a fettle. The altercation increased; and, when the soldier had paid the reckoning, the deceased again collared him, and shoved him from the room into the passage. Upon this, the soldier exclaimed he did not mind killing an Englishman

\* Fost. 291, 292.

† 4 Black. Com. 299.

‡ 5 Burr. 2793.

more than eating a mess of crowdy. The deceased, assisted by another person, then violently pushed the soldier out of the house; whereupon the latter instantly turned round, drew his sword, and stabbed the deceased to the heart: adjudged manslaughter. In this, as in the case of malice prepense and express, if the blow intended for one would in law only have amounted to manslaughter, it will still be the same, though by mistake or accident it kill another.

A quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier, who had before driven part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and, on their pressing on him, he struck at them with the flat side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned he asked whether they had murdered his comrade; and, being several times again assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but, before he passed, the prisoner went up to him, and struck him on the head

with the sword, of which he presently died. This was holden manslaughter; it was not murder as the jury had found, because there was a previous provocation, and the blood was heated in the contest; nor was it self-defence, because there was no *inevitable* necessity to excuse the killing in that manner.

Involuntary manslaughter differs from homicide, excusable by misadventure, in this, that *misadventure* always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one\*.

Accidents frequently occur amongst persons following their lawful occupations, especially such from whence danger may arise. If they saw the danger, and yet persisted without sufficient warning, it will be murder. For instance, in the case of workmen throwing stones and rubbish from a house, in the ordinary course of their business, by which a person underneath happens to be killed: if they deliberately saw the danger, or betrayed any consciousness of it, from whence a general malignity of heart may be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter.

\* Black, Com. b. iv. c. xxiv. Edit. 1791.

But, if it had been in a retired place where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death \*.

So when a mariner, employed in rigging or unrigging a ship, or in other duty aloft, and, without orders or giving warning, throws down any blocks, or other stores upon deck, and thereby kills an officer or seaman, such unwarrantable action will be construed either murder, or involuntary manslaughter †, according to the circumstances which come out before the court martial; for this offence of involuntary manslaughter being, with many others, not specified in the articles of war, will be punished agreeably to the principle before laid down, in such comparative manner as is pointed out by common law.

With regard to the punishment of this degree of homicide, the crime of manslaughter, occasioned by an act where no more was intended than a mere civil trespass, amounts to felony, but within

\* Fost. 252, 263. 1 Hale, 472. 2 Hawk. c. xxix. f. 4.

† Our statute law has severely animadverted on this species of criminal negligence, whereby the death of a man is occasioned. For, by stat. 10 Geo. II. c. 31. if any waterman between Gravesend and Windfor receives into his boat or barge, a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter), but of felony, and shall be transported as a felon.

the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels\*.

Indeed *gross negligence* is in the law said to be almost equal to malicious design: *lata culpa prope dolum est*. And, when any unhappy consequences ensue from such neglect, the thoughtless and careless conduct of the person, who has been guilty of it, is considered in an atrocious light, and liable to the severest punishment. By the laws of many countries, involuntary manslaughter, occasioned by unwarrantable neglect, is liable to the last punishment; and though (as an elegant moral writer observes †) this is no doubt excessively severe, yet it is not altogether inconsistent with our natural sentiments.

There is another species of murder of the most aggravated malignity, and known in our law by the name of *petty treason*, because it is a breach of that allegiance which the murderer oweth to the deceased, at the time the crime is committed ‡. The  
offence

\* Black. Com. b. iv. c. xiv. Edit. 1791.

† Smith's Theory of Moral Sentiments, vol. i. p. 253.

‡ The judgment in petty treason is to be drawn on a hurdle and hanged until dead. It was formerly different in the case of women, who (from a regard to decency, say our books) were burnt alive for the crimes both of high and petty treason; but this was altered by the stat. 30 Geo. III. c. 48. by which they are subjected to the same judgment in all respects as men,  
and

offence of mortally stabbing another, upon some sudden provocation, not then having a weapon drawn, nor having first stricken the party killing, is a peculiar species of manslaughter which is punished, by our laws, as murder. For, by stat. 1 James I. c. 8. commonly called the statute of stabbing, continued by 3 Car. I. c. 4. and 16 Car. I. c. 4 \*, it is enacted, that " every person and persons who shall stab or thrust any person or persons, that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die within six months then next following, although it cannot be proved that the same was done of malice aforethought; yet the party so offending, and being thereof convicted by verdict, confession, or otherwise, according to law, shall be excluded from the benefit of clergy, and suffer

and particularly with respect to the provision of the stat. 25 Geo. II. c. 37.

In Russia, women, for the murder of their husbands, suffer a sort of death less terrible perhaps in idea, but certainly more painful to sense. They are buried alive to the neck, and allowed to remain in this situation several days, until dead.

\* This law was first made on a particular occasion. " The offence (says lord Raymond) consisted in the manner of doing it, because the Scots carried short daggers, and frequently, upon differences arising at table, stabbed others unprovided."

The special grievance between the nations, which gave rise to the statute of James I. c. 8. having been long done away, the particular remedy ought no longer to exist.

death,

death, as in case of wilful murder :” with a proviso, “ that the act shall not extend to cases of self-defence, misfortune, or in any other manner than as aforesaid ; nor to any person who shall commit manslaughter in preserving the peace, or chastising or correcting his child or servant.” The exceptions introduced into this statute are to be adverted to : these are of self-defence, mischance, or for preserving the peace, or chastising the party’s child or servant. But other cases coming within the letter of the act, and not covered by any of those exceptions, have very rightly been adjudged not to be within the meaning of it. Such is the case of an adulterer stabbed by the husband in the act of adultery ; or where a man kills a thief who assaults his house ; the one is manslaughter, the other justifiable homicide \*. So, where an officer pushed abruptly and violently into a gentleman’s chamber early in the morning, in order to arrest him, not telling his business, nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprize took down a sword that hung in the chamber and stabbed him ; this was ruled manslaughter at common law, though the defendant was indicted on this statute † ; for, from the officer’s behaviour, the defendant might reasonably have apprehended that he came to rob or murder him. Perhaps there were circumstances

\* East’s Pleas of the Crown, vol. i. p. 250. Fost. 298.

† 1 Hale, 470.



in that case not mentioned, which might reasonably induce such a suspicion, and raise such a fear as might fall in *constantem virum*. Upon an outcry of thieves in the night, a person, who was concealed in a closet to escape the observation of the family, but no thief, was, in the hurry and surprize, stabbed in the dark: this was considered an innocent mistake, and ruled to be homicide by misadventure\*. It will suffice after these examples to conclude these observations on the statute, with the opinion delivered by Glynn, C. J. in Buckner's case, that, in order to bring a case within the meaning of the act, there ought to be malice.

In this place it may be proper to notice the act of parliament passed (24 June 1803) commonly known by the name of Lord Ellenborough's Act; intituled, "An act for the further prevention of malicious shooting, and attempting to discharge loaded fire-arms, stabbing, cutting, wounding, poisoning, and the malicious using of means to procure the miscarriage of women; and also the malicious setting fire to buildings," &c.

It is thereby enacted, "That if any person or persons, from and after the first day of July, in the year of our Lord one thousand eight hundred and three, shall, either in England or Ireland, wilfully, maliciously, and unlawfully shoot at any of his

\* 1 Hale, 42. 474.

majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded arms at any of his majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or shall wilfully, maliciously, and unlawfully stab or cut any of his majesty's subjects, with intent, in so doing, or by means thereof, to murder, or rob, or to maim, disfigure, or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his majesty's subject or subjects, or with intent to obstruct, resist, or prevent the lawful apprehension and detainer of the person or persons so stabbing or cutting, or the lawful apprehension and detainer of any of his, her, or their accomplices for any offences for which he, she, or they may respectively be liable by law to be apprehended, imprisoned, or detained, &c. that then and in every such case, the person or persons so offending, their counsellors, aiders and abettors, knowing of and privy to such offence, shall be and are hereby declared to be felons, and shall suffer death as in cases of felony, without benefit of clergy: Provided always, that in case it shall appear on the trial of any person or persons indicted for the wilfully, maliciously, and unlawfully shooting at any of his majesty's subjects, or for wilfully, maliciously, and unlawfully presenting, pointing,

pointing, or levelling any kind of loaded fire-arms at any of his majesty's subjects, and attempting, by drawing a trigger, or in any other manner to discharge the same at or against his or their person or persons, or for the wilfully, maliciously, and unlawfully stabbing or cutting any of his majesty's subjects with such intent as aforesaid, that such acts of stabbing or cutting were committed under such circumstances as that, if death had ensued therefrom, the same would not in law have amounted to the crime of murder, that then and in every such case the person or persons so indicted, shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted \*."

The punishment annexed to the crime of deliberate and wilful murder, is universally and throughout the world, *death*.

In the rigid infliction of the judgment of death for deliberate murder, (as observed by an elegant writer on penal law †), both the safety and morality of mankind are greatly interested. It is the voice of nature, confirmed by the law of God, that "who so sheddeth man's blood, by man shall his

\* There is a person now in Newgate (Jan. 1805) under sentence of death under this act.

† Eden's (now Lord Auckland) *Principles of Penal Law*, 3 Edit. p. 244.

blood be shed;" and therefore, saith the Mosaical law, "Ye shall take no satisfaction for the life of a murderer, which is guilty of death, but he shall surely be put to death, so ye shall not pollute the land wherein ye are."

In different countries it is inflicted in various forms, and with different degrees of torture. The wheel, the axe, and the knife, are employed as dire instruments of expiation.

But the benignity of our laws admits only of the privation of life, without resorting to implements of torture, as in other countries. By statute 25 Geo. II. c. 37. the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, and direct him to be executed the next day but one (unless the same shall be Sunday, and then the Monday following), the body to be delivered to the surgeons to be dissected and anatomised; or the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection\*.

The best mode of investigating the nature of the crime of murder, when it falls to be tried before a court martial, will be, by considering its several definitions and the discriminations of guilt, as laid

\* Fost. 107.

down by our first lawyers, and which shall be treated of in its proper place.\*.

The infamous crime so disgraceful to human nature, recited in the 29th article of war, and concerning which perhaps the least notice would be the best, is defined to be a carnal knowledge, committed against the order of nature, by man with man, or in the same unnatural manner with woman, or by man or woman, in any manner with beast †, the crime is punished by our criminal laws in the same manner as other felonies without benefit of clergy, by hanging the transgressor. But Blackstone justly observes, it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made

\* By stat. 2 Geo. II. c. 21. murder is not cognizable by a court martial, when any person dies in England, in consequence of blows or poison received at sea or abroad, or *vice versa*, dies at sea or abroad, in consequence of blows or poison received in England. In the case of Lieutenant Osmond, Dec. 1782, who stabbed Richard Tucker, a seaman belonging to the Vesuvius bomb vessel, as he was coming alongside the Swallow; the wounded man was sent to Haslar hospital, and died there two days afterwards. The coroner's inquest sat on the body and brought in a verdict of wilful murder. The attorney general L. Kenyon gave his opinion, that Lieutenant Osmond should be given up to the civil power, in order to be tried at the next gaol delivery for the county in which Richard Tucker died, as, conformably to the statute, a court martial could not take cognizance of it. See case and opinion, Appendix, No. VIII. sect. 4, 5.

† 3 Inst. 58, 59. 1 Hale, 669.

out; for, if false, it deserves a punishment inferior only to that of the crime itself.

The informer or accuser may indeed be indicted for perjury. Or, in the case of an acquittal, with a certificate from the judge that the prosecution was malicious, the party may have his action on the case, for damages in the court of king's bench; and though the defendant may be poor, yet upon the maxim of Lord Kenyon, He who cannot pay in purse should pay in person, such damages will be given, as may possibly subject the wretch to imprisonment for life \*.

By stat. 25 H. 8. c. 6. revived, confirmed, and made perpetual, by stat. 5 Eliz. c. 17. reciting that, "forasmuch, as there is not yet sufficient and condign punishment for the detestable and abominable vice of buggery, committed with mankind or beast," enacts, "that the same offence be from thenceforth adjudged felony; and the offenders being thereof convicted by verdict, confession, or outlawry, (standing mute, not directly answering or challenging peremptorily above 20, being supplied by the statute

\* It has been decided in a variety of instances, and the offenders have been executed, that to obtain money from a person against his will, by threatening to accuse him of unnatural practices, amounts to the crime of robbery. James Brown was tried and convicted at the Old Bailey, in Oct. 1763; Thomas Jones was tried and convicted in Feb. 1776; and Daniel Hickman in July 1803, and were all executed. See Leach's Crown Cases, 2 Edit. p. 176, 231.

3 & 4 W. & M. c. 9. f. 2.) shall suffer death as felons, without benefit of clergy."

The nature of the evidence, with respect to the actual commission of this offence, being the same at common law as in the case of a rape; it is with reluctance that we are obliged to notice the modes of proof required to substantiate crimes so prejudicial to the morality and safety of society. Lord Coke lays it down, that there must be *penetratio*, that is *res in re*, and also *emissio feminis*, to make rape or sodomy\*: and Lord Hale's summary and Hawkins are to the same purpose; to which the latter adds that emission is said *primâ facie* to be an evidence of penetration†. These again are contradicted by Lord Hale himself, in his more enlarged and correct work‡, who says that, to make rape, there must be an actual penetration or *res in re*, and therefore *emissio feminis* is indeed an evidence of penetration, but simply of itself it makes neither rape nor sodomy, but is only an attempt, &c. But the least penetration makes it rape or sodomy, although there be not *emissio feminis*; and therefore he supposes the case in 12 Coke 37, which says there must be both, is mistaken, and that it contradicts what Lord Coke says in his Pleas of the Crown.

\* 12 Coke Rep. 37.

† Summary 117. 1 Hawkins ch. iv. f. 2. ch. xli. f. i.

‡ 1 Hale, 628.

We find, however, in a variety of reported cases of trials for rape and sodomy, that the learned judges have often differed in opinion, as to what shall be considered sufficient evidence of the actual commission of this crime, and respecting the necessity of one or both proofs, to convict the offender.

In John Duffin's case for sodomy, a special verdict found penetration, but the emission out of the body. Pratt Ch. J. Blencowe, Tracy, [Dormer, Fortescue, and Page, held both to be necessary : *contra* King Ch. J. the chief baron Powis, Price, Eyre, and Montague, thought that penetration was necessary, but not *injection feminis*. Injection, they said, cannot be proved in the case of a child, or of bestiality, and penetration may be evidence of emission ; and Stafford's case, Co. Entr. takes no notice of emission ; and there is a difference between 3 Inst. 58, and 12 Co. 37, which was a posthumous work. The judges being divided, it was proposed to discharge the special verdict, and indict the party for a misdemeanour.

At the sessions before easter term 8 Geo. III. Sheridan was indicted for a rape on M. Brickenshaw. The prosecutrix could not prove any emission ; but Mr. Justice Bathurst, who tried the prisoner, left it to the jury to find the case specially, if they had any doubts ; but, if they believed that the defendant had his will of her, and did not leave her till he chose it himself, then he directed them to find him guilty,



guilty, though an emission were not proved. The jury convicted him. Mr. Justice Bathurst afterwards said, that it was always his opinion that it was not necessary to prove emission; and Baron Smythe, who was present at the trial, was clearly of the same opinion. Hence, we perceive that at this period the weight of authorities was supposed to be much against the necessity of the two proofs.

But in Hill's case, who was tried before Buller J. at the spring assizes at Lincoln 1781, for a rape on Mary Portas, a case was reserved for the opinion of the judges, stating that the fact of penetration was positively sworn to, but that there was no direct evidence of emission, and from interruption it appeared probable that it was not effected.

The learned Judge told the jury, that, if they were satisfied there was an actual penetration, though there were no emission, they ought to find the prisoner guilty: but he desired they would consider the two facts separately, and give their opinions distinctly upon each.

The Jury found the prisoner guilty, but said they did not find the emission; whereupon sentence was respited till the next assizes.

In trinity term Lord Loughborough, Buller, and Heath, Js. held that the offence was complete by penetration only. Lord Ch. B. Skynner, Gould,

Willes, Ashurst, and Nares, Js. and Eyre and Hotham, Bs. held both were necessary, but thought that the fact should be left to the jury; Perrin B. was absent; and Lord Mansfield only said, that a great majority seemed to be of opinion that both were necessary. The majority there went on the ground that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence; the others denied that definition, and also observed that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party. As to what may be considered as proof of emission, supposing it to be necessary, it seems, from what was said by the judges in the last mentioned case, and from Mr. Justice Bathurst's opinion in Sheridan's case, that the fact of penetration, is, *prima facie*, evidence of it; unless the contrary appear probable from the circumstances; and Hawkins is express to that purpose. So, where, upon an indictment for an assault with intent to ravish the prosecutrix, she swore that the defendant had had his will with her, and had remained on her body as long as he pleased, though she could not speak as to emission; Buller J. said, this was sufficient evidence to be left to a jury of an actual *rape*: and therefore ordered the defendant to be acquitted upon the present charge\*. H said, that he recollected a case where a man had been indicted for a rape, and the woman had sworn that she did not perceive

\* East's P. C. vol. i. p. 440.

any thing come from him ; but she had had many children, and was never in her life sensible of emission from a man ; and that was ruled not to invalidate the evidence, which she gave of a rape having been committed upon her.

Sir M. Hale hath observed, “ that the crime of rape ought to be severely and impartially punished with death\* ;” and we may allow it to be one of those unhappy instances in which it is necessary to sacrifice the life of a fellow creature, to the security of good citizens, and the peace of society : but it must also be admitted, that it is a crime peculiarly liable to vary in the degree of its atrociousness, according to the circumstances of the case, and therefore peculiarly open to the divine prerogative of pardon †.

This crime was a felony at the common law, and had a punishment (saith Sir Edward Coke) “ under such a condition as no other felony had the like †.” The offender was adjudged, *amittere oculos, quibus virginem concupivit ; amittere etiam testiculos, qui calorem stupri induxerunt*. The learned author of the *Principles of Penal Law* thus justly remarks on the severity of this punishment, “ as good reasons might be given for cutting off the legs and arms of the offender, as for pulling out his eyes. The idea of castration

\* 1 Hale, p. 634.

† Eden's (now Ld. Auckland's) *Principles of Penal Law*. p. 261.

‡ 2 Inst. 180.

is more obvious, but liable to two objections; it is pernicious to society from the example of barbarity, and inconsistent with that decency which the law ought always to preserve."

The learned Judge Blackstone observes that, in proportion as the crime is most detestable, the proof of guilt ought to be of the clearest and most indubitable nature; and Lord Hale's remark on the crime of a rape may be applied to the other more detestable offence, that it is an accusation easily to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent \*. If the party, as laid down by Lord Hale, on whom the offence of sodomy is committed, be not within the age of discretion, namely, under fourteen, it is not felony in him, but only in the agent. If both be of the age of discretion it is felony in both, and the punishment is death; *agentes et consentientes pari poena plectantur* †. God forbid (as observed by Montesquieu ‡) I should have the least inclination to diminish the public horror against a crime which religion, mo-

\* Beccaria observes, that there are some crimes, which, though frequent in society, are extremely difficult to be proved; a circumstance admitted as equal to the probability of the innocence of the accused. In the crimes of adultery and sodomy, presumptions and half proofs are frequently admitted, as if a man could be half innocent, and half guilty, that is half punishable and half absolvable.

† 3 Inst. 59. ‡ Spirit of Laws, b. xii c. vi.

rality,

ality, and civil government equally condemn ; it ought to be proscribed were it only for its communicating to one sex the weakness of the other, and for leading a people, by a scandalous prostitution of their youth, to an ignominious old age.

As a natural circumstance of this crime is secrecy, there are frequent instances of its having been punished by legislators upon the deposition of a child. This was opening a very wide door to calumny. " Justinian (says Procopius), published a law against this crime; he ordered an inquiry to be made not only against those who were guilty of it, after the enacting of that law, but even before. The deposition of a single witness, sometimes of a child, sometimes of a slave, was sufficient, especially against such as were rich, and against those of the green faction."

Montesquieu adds, " It is very odd that these three crimes, witchcraft, heresy, and that against nature, of which the first might easily be proved not to exist; the second to be susceptible of an infinite number of distinctions, interpretations, and limitations; the third to be often obscure and uncertain; it is very odd, I say, that these three crimes should among us (i. e. in France) be punished with fire."

It is a maxim among the Turks, seldom to make inquiries after secret criminals, being unwilling to seek occasion for scandal; the severity of their laws is directed against open breaches of the peace of society.

society. To this may be added, that, in the histories of the Turks, we read accounts of Turkish seraglios without a woman within the walls \*.

The profligacy of the Athenians on this subject is well known, and the partial restrictions established by Solon, had no tendency to a forcible extirpation of the crime.

Cornelius Nepos, says of Alcibiades "*quod ineunte adolescentiâ amatus est a multis, more Græcorum;*" and that, "*Laudi in Græcia ducitur adolescentulis, quamplurimos habere amatores.*"

In the few instances of accusations of this nature, brought before naval courts martial, that have not been clearly and positively proved, the prosecutors have been stigmatized in the sentences passed, by the court's declaring the charges malicious, vexatious, oppressive, and ill-founded—a trivial compensation for the accusation of a crime of so black a nature! so easily charged by ill-disposed persons, and which the delicacy of our English laws treats, in its very indictments, as a crime not decent, or fit to be named. "*Peccatum illud horribile, inter Christianos non nominandum*†."

The

\* Principles of Penal Laws, 267.

† By the Egyptian laws, a false accuser was subject to the punishment which the accused was exposed to have suffered if he had been found guilty. 1 Millot An. Hist. 31.

At

The voice of nature and of reason, and the express law of God, determine the punishment to be capital. The denunciation in the Mosaic law is, "If a man also lie with mankind as he lieth with a woman, both of them have committed abomination, they shall surely be put to death; their blood shall be upon them. And if a man lie with a beast, he shall surely be put to death\*."

Long before the Jewish dispensation, we have a signal instance of the crime being punished by the destruction of two cities, by fire from heaven. Our ancient law in some degree imitated this punishment, by ordering such miscreants to be burnt to death †. But now, the general punishment of all felonies is the same, namely, by hanging the offenders.

The crime of *robbery*, by the 30th article of war (navy) is made punishable with death; or otherwise, as a

At Athens, if an accuser, had not the fifth part of the votes on his side, he was obliged to pay a fine of a thousand drachms. At Rome a false accuser was branded with infamy, by marking the letter K. on his forehead. Guards were also appointed to watch the accuser, in order to prevent his corrupting either the judges or the witnesses. See Plutarch in a treatise entitled, "How a person may reap advantage from his enemies."

\* Levit. xx. 13, 15.

† Brit. c. ix. A similar punishment was inflicted by the French penal code. Messrs. Bruneau le Noir et Jean Diot convaincus de ce crime ont été brûlés en place de Grève le Lundi, 6 Juillet. 1750. Code penal, 238.

court

court-martial, upon consideration of the circumstances, shall find meet. In this article there is no mention of *theft*, though the law of England makes a nice distinction betwixt robbery and theft, by defining the former \*, the felonious and forcibly taking from the person of another; of goods or money to any value, “by violence or putting him in fear †;—” and this is the criterion that distinguishes robbery from other larcenies:—the latter, the felonious taking and carrying the goods of another, either from his person or house, is distinguished into two sorts—simple and compound larceny. Simple larceny is the taking and carrying away goods, and is called *petit*, if under the value of a shilling; and *grand*, if above that sum ‡. *Compound* larceny is aggravated, by taking the goods or money from one’s house or person. The punishment, however, annexed to this last species of theft by common law is death, although by various statutes the party may pray the benefit of his clergy; and the punishment annexed to robbery, is always made capital.

By stat. 31 Eliz. c. 4. s. 1. If any person, having the charge or custody of any armour, ordnance,

\* Black. Com. b. iv. c. xiv. Edit. 1791. † 1 Hawk. P. C. 95.

‡ In prosecutions for grand and petit larceny, a reasonable comparative value is always put by the jury on the articles stolen; for when the stat. of Westm. 2. c. 25, was made, silver was but 20d. an ounce, whereas it is now at the value of 5s. 7d. or 5s. 6d. an ounce,

munition,



munition, shot, powder, or habiliments of war, of the queen, &c. or of any victuals provided for any foldiers, gunners, mariners, and pioneers, shall, for any lucre or gain, or wittingly, advisedly, and of purpose, to hinder or impeach her majesty's service, embezzle, purloin, or convey away the same, to the value of 20s. at one or several times; such offence shall be adjudged felony, &c. By sect. 2. the prosecution must be commenced within a year after the offence done. But, further, though the statute speaks only of embezzling or stealing stores to the value of 20s. still it seems, that any of the officers who have a bare charge of taking care of the stores in the king's warehouses, or a mere authority to order them to be delivered out to the several workmen, or others properly authorized to receive them, may be guilty of felony at common law in stealing them, to any amount, from such places of deposit.

The stat. 39 & 40 Geo. III. c. 89. s. 1. reciting the acts of the 22 Car. II. c. 5.—9 & 10 W. III. c. 41.—9 Geo. I. c. 8. and 17 Geo. II. c. 40. s. 10. and that, notwithstanding the penalties and punishments inflicted by the said recited acts, the stealers, embezzlers, and receivers of his majesty's warlike and naval ordnance, and victualling stores, had greatly increased, so that it had become necessary to make some further and effectual provision, for preventing their wicked practices in future; enacts, "that, from and after the passing of the act,

(18th

(28th July 1800,) every person or persons (such person or persons not being a contractor or contractors, or employed as in the said recited act of the 9 & 10 W. III. is mentioned,) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered, to any person or persons whomsoever; or who shall willingly or knowingly receive, or have in his, her, or their custody, possession and keeping, any stores of war, or naval ordnance and victualling stores, or any goods whatsoever marked, as in the said recited acts are expressed; or any canvases marked, either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called buntin, wrought with one or more streaks of raised tape; (the said stores of war, or naval ordnance, or victualling stores, or goods above mentioned, or any of them, being in a raw or unconverted state, or being new, or not more than one third worn;) and such person or persons, who shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on conviction, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported, &c. unless such person or persons shall, upon their trial, produce a certificate, under the hands of three or more of his majesty's principal officers and commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such

stores or goods, as they shall then be indicted for, and the occasion or reason of such stores or goods coming to their hands or possession.

The offences strictly military, and as such peculiar to martial law, falls under our 4th and last distribution of general heads. They are recited in the 10th, 11th, 12th, 13th, 14th, and 17th naval articles of war\*; and in comparing the punishments annexed to them with those of other nations, we shall even find that a greater degree of lenity pervades our own martial laws, than those of the ancients or moderns. The 12th and 13th articles, as they formerly stood, by restraining the power of a naval court martial to the positive inflicting of the punishment of death, in the cases therein mentioned, of cowardice, negligence, or disaffection in time of action, &c. were deemed extremely severe, and attended with peculiar hardships and inconveniencies†. It was therefore, by statute

\* Vide Articles of War, Appendix, No. I.

† The unfortunate Admiral Byng fell under sentence of death for a breach of part of the 12th article, though he was acquitted of cowardice or disaffection, the most odious and heaviest branches of it, and the court could not resist expressing, in the body of the sentence, the hardship of the case, in the following words: "As that article (alluding to the 12th) positively prescribes death, without any alternative left to the discretion of the court, under any variation of circumstances, the court do therefore unanimously adjudge the said Admiral John Byng to be shot to death." See sentence, Appendix, No. XXXIV.

19 Geo. III. c. 17. § 3. explained and amended, whereby it is now lawful for a court martial to pronounce sentence of death, or to inflict such other punishment as the nature and degree of the offence therein recited shall be found to deserve \*.

In the military code, the articles falling under the fourth and last distribution of crimes are as follow:

Section 8. Articles 1, 2, 3, 4 and 5, relative to sutling, and conniving at others selling provisions to soldiers at exorbitant rates, &c.

Sect. 9. Articles 1, 2, 3, 4, and 5, Commanding officers quartering more than the number of effective men, and not redressing all abuses, or disorders in quarters, garrisons, or on a march.

Sect. 10. Commanding officers to pay for carriages on the march, and not to suffer the persons attending them to be abused.

Sect. 12. Mode to be adopted by officers, non-commissioned officers, or soldiers, in redressing wrongs.

Sect. 13. Articles 1, 2, 3, 4, 5, and 6, embezzling military stores; wasting ammunition de-

\* Vide sections of acts of parliament relative to naval courts martial, Appendix, No. II. § 15.

turned out for the service; spoiling arms, accoutrements or regimental necessaries; commissioned officers embezzling or misapplying regimental money; and non-commissioned officers embezzling, or misapplying the pay of the men.

SECT. 14 from art. 1 to 21 inclusive comprises, the duties in quarters, in garrison, or in the field, viz. Officers and soldiers to behave themselves orderly in quarters and on their march. Non-commissioned officers and soldiers not to absent themselves one mile from the camp. Not to lie out of quarters, garrison, or camp, without leave. Retiring to quarters on the beating of the retreat. Repairing at the time fixed to the parade of exercise, or other rendezvous. Quitting guard before regular dismissal. Hiring another to do his duty. Officers conniving at soldiers doing so. Officer or soldier quitting his platoon or division, without leave of his superior officer. Found drunk on guard. Centinel found sleeping on his post, or quitting it before he is relieved. Doing violence to any person, who brings provisions or other necessaries to the camp, garrison, or quarters of his majesty's forces. Forcing a safeguard. Making known the watchword, or giving a false one. Making false alarms in camp or quarters. Public stores taken from the enemy to be secured. Leaving post or colours in search of plunder. Casting away arms or ammunition. Misbehaving before the enemy, or shamefully abandoning or delivering up any garrison,

fortress, post, or guard, committed to his charge. Compelling others to do the same.

Sect. 16. Articles 19, 20, 25, and 26, menacing words, gestures, or disturbances before a military court martial. Releasing prisoners to be tried by a court martial without proper authority. Officers breaking his arrest, or leaving his confinement. Officer behaving in a scandalous infamous manner, such as is unbecoming the character of an officer and a gentleman.

Sect. 17. Regimental accounts to be transmitted, agreeably to regulations.

In the preceding pages of this Chapter, we have exhibited, to our naval and military readers, a general view of the division of crimes and punishments, contained in the naval and military articles of war; and pointed out, with as much perspicuity as the limits of this undertaking would admit, the several offences that bear an analogy with the punishments annexed, as established by the common and statute laws of the land. In treating of the doctrine and rules of evidence in a subsequent part of this work, as established by the practice of courts martial, and our criminal courts of law, as well as of judging of the guilt of crimes, we shall have an opportunity of entering into further details on those important topics\*.

\* Book II. chap. iii. iv. and v.

## C H A P. IV.

*Of Naval and Military Courts of Enquiry, as established by the usage of both Services.*

**A**LTHOUGH no articles of war, or acts of parliament, authorize Courts of Enquiry; either in the army or navy, yet, from various precedents and customs long established, they have become an essential branch of military and naval jurisdiction.

When we consider the king as the supreme magistrate of the kingdom, and vested with the executive power of the law, as generalissimo, or first in military command, and as having the sole power of raising fleets and armies \*, he appears, *ex officio*, to possess an undubitable authority to appoint courts of enquiry, where it may be necessary, to examine into the conduct of individuals, and ascertain what justifiable grounds there may be for bringing transgressors to trial, by the formality of a court martial. And it cannot escape the reader, how close an analogy this court bears to the in-

\* Black. Com. b. iii. Edit. 1791.

stitution of our grand jury ; and, since it is established for the same purpose as this much applauded part of our constitution, it seems entitled to our warmest commendation.

In cases of much importance in the navy and army, and where the facts to be investigated by court martial are doubtful, and involved in a variety of collateral circumstances, tending in the first instance to perplex and mislead the judgment of the superior power in forming a correct opinion, with respect to the criminality of the person suspected ; or where there are several persons implicated in the same crime or offence, and doubts remain on whom the culpability should fall or ought to attach ; a court of enquiry, in conformity to the inquest of a grand jury in civil courts of criminal jurisdiction, should take the matter under investigation, and, from the evidence before the members, report, to the power vesting them with authority to enquire, whether or not there be sufficient grounds for bringing the person or persons, whose conduct has been the subject of enquiry, to a court martial, in order that if found guilty judicially, a punishment corresponding to the offence may be inflicted.

It is usual for the king, or any commander to whom the power of assembling courts martial is delegated, to appoint courts of enquiry for examining



mining either the conduct of officers of rank in the army, or the conduct of such persons as may be under a similar predicament as that we have above noticed; in order to ascertain whether there be or not sufficient reasons for bringing the charges before a court martial, that the party accused may have an opportunity of defending himself by exculpatory evidence, or otherwise judicially.

In the year 1757, his late majesty issued a warrant, directed in the usual mode to the Judge Advocate General, nominating the Duke of Marlborough Lieutenant General, Lord George Sackville, and John Waldegrave, Major Generals of his forces, to hold a court of enquiry on the general and other officers employed on an expedition with his majesty's troops on the coast of France, at or near Rochefort (August 1756); and they were directed to make the necessary enquiry, and report the causes of failure, with their opinion thereon to his majesty.

The report of enquiry was the grounds on which Sir John Mordaunt, the commander of the expedition, was afterwards tried by a general court martial. In his defence, he very judiciously availed himself of an act of injustice and impropriety committed by the members of the said court of enquiry, by examining him as to matters of fact tending to criminate himself, and thereby furnishing evidence

on matters for which he was afterwards to be arraigned as a criminal. The law very justly and humanely protects either a person accused of a crime, or a witness from answering any question that may tend to criminate himself. Neither can he be compelled to answer any question to shew his own turpitude or infamy\*.

On every consideration of a court of enquiry conducted with fairness and impartiality, it may be regarded as a royal mark of lenity rather than severity; more particularly when we consider the prerogative of the crown to dismiss officers from the service, without giving them the chance of any form of trial.

The Lords Commissioners for executing the office of Lord High Admiral have, upon similar principles, the power of appointing courts of enquiry in the navy, as being immediately derived from the crown; but neither the king nor the admiralty have power to inflict any corporal punishment for offences, unless by sentence of a court martial. We have, however, many instances of the exercise of the crown's prerogative in dismissing officers of rank from the service, even after having undergone the tedious forms of trial by a

\* 4 Inst. 479. See illustrations of this doctrine hereafter in Book II. c. ii. and iii. relative to examining evidence,

court martial, and acquitted of the charges exhibited against them\*.

Admiral Earl of Torrington, in the reign of king William III. was tried at a court martial, in pursuance of a commission from the lords of the admiralty, upon the following heavy charge, founded upon the report of commissioners previously appointed to enquire into his conduct, viz. *his having, in the engagement with the French off Beachy-head, through treachery or cowardice, misbehaved in his office, drawn dishonour on the English nation, and sacrificed our good allies the Dutch; and, notwithstanding the court unanimously acquitted his lordship of any imputation whatever from his conduct on that occasion, his commission was suspended, and he never was afterwards employed. As the Earl of Torrington was a peer of the realm, there were some difficulties to be got over in constituting a court for his trial, and which called forth the attention of the legislative bodies at that period.*

\* In July 1702, Sir John Munden, rear admiral of the red, was tried by a court martial, in pursuance of a commission from Prince George, then lord high admiral, upon several charges exhibited against him; of miscarriage and neglect, in intercepting a squadron of French ships bound to the West Indies; and notwithstanding the court acquitted him, and gave their opinion that he had complied with his instructions, and behaved himself with great zeal and diligence in the service, Queen Anne dismissed him.

The king was resolved it should be by a court martial; but the earl and his friends maintained a right of being tried by his peers. The power of the admiralty to issue a commission to try the earl was questioned, and it was judged expedient to settle so important a point by the authority of parliament.

To obviate those difficulties, a Bill was brought in for vesting in the Lords Commissioners of the Admiralty the same power, in regard to granting commissions, which was already vested by law in the Lord High Admiral of England.

The king appointed a new Board of Admiralty, composed of seven members instead of five, the former number, and to this board it was that the intended act gave the power, possessed by a Lord High Admiral, of appointing courts martial for the trial of any officer of whatever rank \*.

On the third reading of this Bill in the House of Lords it occasioned warm debates; it was however carried by a majority of two and many of the lords entered their protest †.

\* The history and proceedings of the House of Lords, vol. i. p. 405.

† See particulars and protest, Appendix No. III.

In all doubtful cases, Courts of Enquiry are useful, and the original intent of them appears to have arisen from a lenient wish not to give unnecessary trouble, either to the person whose conduct is the subject of enquiry, or to the assemblage of members necessary to compose a court martial, and which assemblage might sometimes cause delays, highly injurious and detrimental to the service.

A court of enquiry, by examining the evidence produced on both sides in a summary manner, *viva voce*, is divested of all that formality and procrastination incident to a court martial, and withal attended with less inconvenience to the service, by having fewer members\*.

Indeed it is a subject of regret, that courts martial are frequently assembled for trivial offences, and the charges sometimes unsupported by proof, and, being thereby rendered too familiar to the minds of officers and seamen, they lose that solemnity and efficacy intended by the legislature. In this light courts of enquiry must be deemed useful, even by those who animadvert on their legality; as few or none ever escape punishment, that are brought to trial at

\* Three members are generally deemed sufficient at courts of enquiry; but where the matter is important, it is usual in the navy to have five members. In the army they have seldom more than three. On the failure of the Rochfort expedition, the king appointed the Duke of Marlborough, Lord Sackville, and Major General Waldegrave, to make the enquiry.

a court

a court martial, in consequence of charges grounded on the previous report or opinion of a court of enquiry\*.

No oath is administered to the members or witnesses at a court of enquiry, as at a court martial; and many people have questioned even the legality of any witness being obliged to give testimony, or of the person, whose conduct is the subject of enquiry; being bound to plead before a court of enquiry, and for this obvious reason, that it might be more favourable to reserve his evidence, and the palliating circumstances of the accusation, until a legal court was constituted. Hence the report or opinion of a court of enquiry, upon circumstances thus supposed to be superficially investigated, has been often complained of by the person subsequently brought to trial, as having a tendency to bring forward a charge against himself, or to make unfavourable impressions on the minds of his judges. It is admitted, that there may be strong reasons of complaint against the report or opinion of a court of enquiry, upon which the subsequent trial by court martial is founded, should the persons appointed to make the

\* In the army, a practice is frequently resorted to among the officers of a regiment or corps, of holding among themselves a council of enquiry, when any member of the corps has been suspected of any crime or impropriety of conduct, in order to ascertain his delinquency or innocence, that proper measures may be eventually taken.

enquiry state the causes of ill conduct, or enter into a detail of circumstances, that are apparently against the person whose conduct is the subject of enquiry. But when the report or opinion simply indicates, that there appears sufficient cause or grounds to render a court martial necessary, and when it is considered, that the members composing the court of enquiry are not entitled to sit as judges at the court martial, upon the same principle as the members of the grand jury are not allowed to be empannelled into the subsequent petty jury on the same cause\*, it surely then cannot operate against the individual tried thereat; for though an opinion, formed from the striking circumstances of the matter before the court of enquiry, may be submitted to the judgment of those who delegate the power for assembling a court martial, there can be no direct implication of guilt, until the individual has had a fair opportunity of exculpating himself, by the cross-examination of the prosecutor's evidence upon oath, when it comes to be investigated at a court martial, as well as of those witnesses he may have to produce in support of his defence.

It must be acknowledged, that courts of enquiry are useful, in adjusting disputes arising between officers, and reconciling all differences and animosities

\* Black. Com. b. iv. Edit. 1791. — It would be a sufficient challenge against the member of a court martial, that he had previously sat on a court of enquiry, for examining into the conduct of the party to be tried,

that

that may occur in service, amidst the various tempers and caprices of men. These often are of such a nature, that nothing criminal can perhaps be imputed to either party, if brought before a court martial; and courts of enquiry, in such cases, prevent much unnecessary trouble, and do not materially retard or obstruct the service.

Notwithstanding what we have advanced respecting the extreme utility of courts of enquiry, and the invariable practice hitherto adopted, of returning a specific report, or an opinion to the superior power, by whose authority they are held, yet we may presume to hazard an opinion, that if the members of a court of enquiry were in all cases to deliver their opinion in general terms, as a grand jury do their verdict, by simply finding *a true bill or no bill*, or in other words, sufficient grounds or no grounds for a court martial; it would be more congenial with the spirit of our constitution, and in some measure do away the animadversions hitherto made upon courts of this nature, of their being arbitrary, of ambiguous authority, and having no foundation in law.



CHAP. V.

*Of Naval Courts Martial, and of General, Regimental, Garrison, and Detachment Courts Martial, as at present established in both Services.*

ALTHOUGH the legality of martial law has been questioned by some of our ablest lawyers yet the authority, by which our naval and military courts martial are held, is as permanent and indubitable as that of any other courts of judicature in the kingdom, as being established by parliament, and derived from the crown. Sir Edward Coke observes, "that if a lieutenant, or other that hath commission of martial law, doth, in time of peace, hang, or otherwise execute a man by colour of martial law, this is murder, for it is against *Magna Charta*," 3 Inst. 52.; and Sir Mathew Hale declares, "martial law to be in reality no law, but something indulged rather than allowed as a law; that the necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." *Hale's Hist. of the Com. Law*, c. a. "And if a court martial put  
a man

a man to death in time of peace, the officers are guilty of murder." *Hale's Pleas of the Crown*, p. 46.

The doctrines laid down by these great lawyers have allusion to former systems, of martial law, practised in this country, but now more than a century exploded. So long as there exists the necessity of keeping a standing army, and commissioning a certain number of ships of war in time of peace, it is obvious, rules and articles for their government and discipline must be framed, and which can only be maintained by a power conferred by the legislature, for inflicting punishments by courts martial.

The case of Serjeant Samuel George Grant, argued at length in the court of Common Pleas, Trinity term 1792\*, has thrown much new light on several particulars relative to courts martial, more especially on the distinction drawn by the late learned Lord Chief Justice (*Loughborough*), in delivering the opinion of the court between military law, as it now exists in these realms, and martial law as anciently exercised, and so strongly animadverted upon by Sir Edward Coke and Sir Mathew Hale, in the passages from their works above cited.

This important case arose on a motion for a prohibition to prevent the execution of a sentence

\* Grant v. Sir Charles Gould, Black. Rep. p. 69.

passed

passed against the plaintiff Grant, by a general court martial, held at Chatham barracks. The court were of opinion, that he the said Samuel George Grant, "was guilty of having promoted, and having been instrumental towards the enlisting of Francis Heretage and Francis Stephenson into the service of the East India company, knowing them at the same time to belong to the said regiment of foot guards; and, deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that it is rather inferior, but in a very slight degree, in point of aggravation, they did adjudge him to be reduced from the rank and pay of a serjeant, and to serve as a private soldier in the ranks; and the said Court did adjudge him to receive one thousand lashes on the bare back, with a cat-o'-ninetails by the drummers of such corps or corp, at such time or times, and in such proportions as his majesty should think fit to appoint."

Serjeant Marshall, in support of the motion for a prohibition, argued with great ability and ingenuity the following points, on which he pleaded the court ought to grant a prohibition.

1. That the plaintiff Grant was not a soldier, and therefore not liable to be tried by martial law.

2. That evidence was received against him, contrary to the rules of the common law; and  
evidence

evidence for him, which was admissible, was rejected.

3. Supposing him to have been a soldier, yet he ought not to have been convicted of any offence, with which he was not specifically charged previous to his trial.

4. The offence, of which the plaintiff was convicted, is not an offence cognizable by martial law.

On the first ground he observed, "that if there be a case in which, above all others, it becomes the courts of Westminster to be particularly watchful over the right of the subject, it is in the case of a court martial deciding on the extent of its own jurisdiction. It is not disputed, that a court martial has power to try the question whether soldier or not: that power must be inseparable from their jurisdiction. But they exercise it at their peril, and it behoves them to have the most explicit and unequivocal proof that a man is a soldier, before they venture to put him on his trial, for any offence whatever. If it shall be in the power of any military commander to take up a man, under pretence of some supposed military offence, and it be in the power of a court martial to give themselves jurisdiction over him, by deciding him to be a soldier, upon evidence such as has been received in the present instance; the liberty of the subject

is at an end, and the army may, as soon as its commanders shall think fit, become the sovereign power of this country. That in fact the plaintiff was not a soldier, appears from the proceedings before the court martial.

2. Evidence was received against the plaintiff, which was not admissible by the rules of the common law; and evidence for him rejected, which ought to have been received. Every court, which assumes the name of a court of justice, must have some principles or rules for its guidance, in the investigation of truth. The rules of evidence of the common law, at least so far as they are applicable to criminal proceedings, are neither numerous nor complex, but plain and simple, and are founded in wisdom, and established by the experience of ages. The rules of evidence are perhaps those of all others which ought to be kept inviolate, with the most religious veneration. The whole administration of justice, both civil and criminal, in a great measure depends on them.

A military court martial is the mere creature of the mutiny act, and has not the smallest shadow of authority, but what it derives from that act: it is impossible that it can have any ancient or immemorial rules of evidence, peculiar to itself. Now, it may be laid down, as a clear and indisputable principle of law, that wherever an act of parliament erects a

new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules; from which it will not suffer such new erected court to depart. This would hold even in matters, merely civil, and surely much more strongly in questions of a criminal nature.

This is not mere theory, but the law of the land: and the general practice of courts martial is conformable to it.

This appears by every treatise that has been published on the subject, of either naval or military courts martial. *Adye on Courts Martial*, 174. *Sullivan's Thoughts on Martial Law*, 45. 55. *Military Arrangements*, 121. *Macarthur's Treatise on Naval Courts Martial*, 107. 112. and *Frye's Case*, in the *Appendix of that Work*, No. 13. p. 62\*.

3. Supposing the plaintiff to have been properly found to be a soldier, yet he ought not to have been convicted of an offence, with which he was not specifically charged previous to his trial.

It is a principle of natural justice, and therefore it is a rule of the law of England, that no man shall be put upon his trial for any offence, before any court of

\* The reference made by the learned Serjeant in the above argument, was to the first edition of this work, early after its publication; and he was the first lawyer who took notice of the treatise, by quoting it in a court of justice.

judicature,

judicature, unless, previous to such trial, he has been distinctly and specifically charged with such offence, and called upon to answer it; for it is impossible for any man to come prepared to defend himself against a charge, of which he is ignorant. This rule was early recognised and solemnly established, by several judgments in parliament. The want of a previous charge was the principal error, upon which the judgment against the *Mortimers* in the time of Edward II. was reversed in parliament, in the 1 Edward III. 2 *Hale*, P. C. 217.

So the like was done in the case of the Earl of *Lancaster*, in 1 Edw. III. 1 *Hale*, P. C. 314. And in *Hale* there are many instances and authorities to prove, that no man can be convicted or attainted of any crime without arraignment, and being put to answer it. 1 *Hale*, P. C. 346.

The conviction of Grant is founded on a supposed prior desertion, and indeed it is so apparent, that the men had deserted before they came to the plaintiff to be enlisted, that the court martial could not proceed upon any other idea: consequently the offence found is promoting and being instrumental, in the enlisting of men for the India Company, who had already deserted. This therefore, taking it to be an offence at all, is that of an accessory after the fact.

The desertion of the men was already complete; and *being instrumental to their being enlisted*, with the India Company, was perfectly different from the offence of *persuading them to desert*. Persuading to desert is the substance of the offence; enlisting is only a circumstance. It is true that a man, charged with a capital crime, may be convicted of an offence of an inferior degree; but then it must be of the *same nature*, with the offence charged. But the offence, found in this sentence, is not of the same nature. The charge contains an offence prohibited by the articles of war; it also contains a circumstance which is there added by way of aggravation, but which (as will be proved hereafter) is no offence, either by the articles of war or by the mutiny act. Now, the offence found is only this matter of aggravation, which is subjoined to the charge and not the charge itself, or any inferior species or degree of it; and even that is found different from the charge. The charge, in that respect, is *advising and persuading to enlist* into the service of the India Company.

The offence found is *promoting and being instrumental* towards the enlisting.

Suppose a person indicted as an accessary, before the fact, in feloniously advising and persuading I. S. to steal my goods, and the jury find that, at such a time and place, I. S. did steal my goods; and that the defendant received the same goods, knowing



ing them to have been stolen : this verdict would be void, as finding a matter not in issue. And no court, which was guided by the rules of law, could give judgment against the defendant, on a verdict convicting him of an offence for which he was never arraigned, and to which it was impossible for him to be prepared with any defence.

Taking this to be of the nature of a special verdict, the court, in construing it, must confine itself to the facts expressly found, and cannot supply the want of them by any argument, intendment, or implication whatever ; in this all the writers on courts martial before cited agree. *Adye*, 207. *Sullivan*, 75. *Macarthur*, 143. *Edit.* 1792.

4. The matter, of which the plaintiff is convicted, is not an offence cognizable by martial law.

The necessity of confining courts martial strictly within their jurisdiction has already been shewn ; and it is not only necessary to confine them strictly within the limits of their authority, with respect to the persons accused, but also with respect to the offence, with which they are accused. The offence found, is the having promoted, and having been instrumental towards the enlisting of Herotage and Stephenson, into the service of the India Company. But what, it may be asked, is the meaning of promoting and being instrumental towards their enlist-

ing? By what means did the plaintiff promote or become instrumental to this? This ought to have been explicitly stated: as the sentence stands it is vague and fallacious.

But, taking it for granted that the court martial had convicted the plaintiff, in express words, of enlisting these men into the service of the India Company, knowing them to be deserters from the Guards; this offence is neither within the articles of war nor the mutiny act, unless it be within the 53d section of the act, which "imposes a penalty of 5 l. on any person who shall harbour, conceal, or assist any deserter, knowing him to be such, on conviction before a justice of peace, to be levied by distress, and, for want of a distress, three months imprisonment \*."

But merely enlisting a soldier, "who has already deserted, even though the party knew him to be a deserter, is no offence, either against the mutiny act, or the articles of war. If it had been either within the one or the other, the court martial would have shewn it in their sentence, as is usual. *Sullivan*, 101. The offence, if any, seems to have been that of harbouring or concealing the men; but that

\* By the mutiny act, passed March 1804, the 69th section imposes a penalty of 20 l. on any person harbouring, concealing, or assisting any deserter from his majesty's service, and for want of distress six months imprisonment.

is totally different from promoting and being instrumental towards their enlisting."

After Serjeants Adair and Bond had argued against the motion, and Serjeant Marshall in reply had insisted upon his former grounds of argument, Lord Loughborough, in delivering the opinion of the court, with that force, clearness, and precision peculiar to himself, set out with observing that, "in this case, which arises on a motion for a prohibition, the novelty of the application was a sufficient reason why the court should grant a rule to shew cause, and give it that consideration which the importance of it seemed justly to demand. It has been very fully argued on both sides, and with great ingenuity and ability. Every thing has been said, in support of the motion, by my brother Marshall, that any talents, ability, or ingenuity could suggest. But, upon the result of the whole, the court are clearly of opinion that the prohibition ought not to issue.

The suggestion begun by stating the laws and statutes of the realm, respecting the protection of personal liberty. It goes on to state; that no person ought to be tried by a court martial, for any offence not cognizable by martial law, and so on.

In the preliminary observations on the case, my brother Marshall (continued the learned Judge) went at length into the history of those abuses which

prevailed in ancient times. This leads me to an observation, that martial law, such as it is described by Hale, and such also as it is marked by sir William Blackstone, does not exist in England at all.

Where martial law is established, and prevails in any country, it is of a totally different nature from that which, by inaccuracy, is called martial law, merely because the decision is by a court martial; but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and has been for a century totally exploded.

Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances: even their debts are subject to inquiry, by a military authority. Every species of offence, committed by any person who appertains to the army, is tried not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army in those states, which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of the military authority. In the reign of king William, there was a conspiracy against his person in Holland; and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against his person  
in

in England; but the conspirators were tried by the common law. Within a very recent period, the incendiaries, attempting to set fire to the docks at Portsmouth, were tried by the common law. In this country the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law: but, where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore, it is totally inaccurate to state martial law as having any place whatever, within the realm of Great Britain. But, there is by the providence and wisdom of the legislature, an army established in this country, of which it is necessary to keep up the establishment. The army being fixed by the authority of the legislature, it is an indispensable requisite of that establishment, that there should be order and discipline kept up in it; and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. This has induced the absolute necessity of a mutiny act, accompanying the army. It has happened indeed, at different periods of the government, that there has been a strong opposition to the establishment of the army; but the army being established and voted, that led to the establishment of a mutiny act. It is one object of that act to provide for the army; but there is a much greater cause for the existence of a mutiny act, and that is, the preservation of the peace and safety of the kingdom: for there is  
nothing

nothing so dangerous, to the civil establishment of a state, as a licentious and undisciplined army. The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and foldiers ; and the object of the trial is limited to breaches of military duty. Even, by that extensive power granted by the legislature to his majesty to make articles of war, those articles are to be for "the better government of his forces ;" and they can extend no further than they are thought necessary, for the regularity and due discipline of the army. Breaches of military duty are in many instances, strictly defined ; they are, so in all cases, where a capital punishment is to be inflicted. In other instances, where the degree of offence may vary exceedingly, it may be necessary to give a discretion with regard to the punishment ; and, in some cases, it is impossible more strictly to mark the crime, than to call it a neglect of discipline.

The learned Judge then proceeded to sum up the arguments on both sides of the question, and concluded with observing that, "taking the whole of the case together, it is clear that there is ground to suppose that they (the court) meant to convict Grant of the charge. But if, by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it is an error in the proceedings : but we cannot prohibit upon

upon that account. The sentence, in the case of an unfortunate admiral, was certainly an inaccurate one. The question there was, whether the court had not mistaken the law, yet a prohibition was not thought of\* : but it is unnecessary to discuss the sentence further ; it would be extremely absurd to comment upon it, as if it were a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed."

With respect to the sentence itself, and the supposed severity of it, his Lordship observed that " the severe part is by the court deposited, where it ought only to be, in the breast of his Majesty. I have no doubt but that the intention of that was, to leave room for an application for mercy to his Majesty, from the goodness and clemency of whose disposition, applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve."

The king has the prerogative of pardoning and remitting punishment : but his Majesty, until the late act was passed, respecting prisoners under the sentence of a naval court martial, to be hereafter noticed,

\* The reporter remarks in a note, that, " it is presumed his Lordship here alluded to the sentence against the unfortunate admiral Byng ; and which he has recited with the amendment by act Geo. 3. c. 17. s. 3. to the 12th article of war, under which he suffered, and quoted the Appendix, No. 34. of this treatise, where the reader may consult the said sentence and amendment to the 12th article of war."

could

could no more alter the sentence of a court martial, than he could a judgment pronounced in other courts of judicature, or the verdict of a jury; unless a recommendation to that effect were expressed in the sentence.

The king has not only the prerogative of pardoning and remitting the punishments, ordered to be inflicted by military courts martial, but, in the event of disapproving of the sentence, he may mitigate the punishment, or order the court to sit again, and revise their proceedings.

In the very recent instance of a sentence of a general court martial, adjudging lieutenant-colonel William Jephson, major of the 17th regiment of light dragoons, to be suspended from rank and pay, for the space of six calendar months, his Majesty, adverting to the detriment which a regiment as well as the service must at any time, and more especially in the present juncture, sustain from the circumstance of a field officer being suspended during so long a period, deemed it indispensable that lieutenant-colonel Jephson should retire; but, in consideration of his having served upwards of twenty-three years, his Majesty was graciously pleased to permit him to receive the regulated price for his regimental commission, from the officer who should be appointed to succeed him\*.

\* See General Orders from his Royal Highness the Duke of York, and the Judge Advocate General's letter, February 1804. Appendix, No. LII.

This,



This, on a superficial view, appears to be an alteration of the sentence. But, when it is considered that it does not add to the judgment, and that it is a fundamental principle of the common law of England, of which the martial is a branch, that a man cannot suffer *more* punishment than the law assigns, but that he may suffer *less*; the commutation (or rather mitigation) here alluded to, from a greater to a smaller degree of punishment, exhibits, in a favourable point of view, that benign exercise of royal clemency, with which, by law, his Majesty as chief magistrate is fully vested, and who, at all times, has it in his power (as Judge Blackstone emphatically remarks) “to extend mercy wherever he thinks it is deserved, holding a court of equity in his own breast, to soften the rigour of the general law, in such cases as merit an exemption from punishment\*.”

By the stat. 37 Geo. III. cap. 14. intituled, “An act to enable his majesty more easily and effectually to grant conditional pardons to persons under sentence by naval courts martial, and to regulate imprisonment under such sentence,” we find in substance, in the first section, that, if his majesty shall extend his mercy to persons liable to death by the sentence of a naval court martial, any justice of the court of King’s Bench or Baron of Exchequer may, on notification from the Secretary of State, allow the be-

\* 4 Black. Com. c. xxxi. Edit. 1791.

nefit of such conditional pardon, as if the same had passed the great seal, and shall make orders accordingly.

2. The justice or baron allowing the pardon, to direct the notification, and order it to be filed with the clerk of crown of the court of King's Bench.

3. When any offender, tried by a naval court martial, is ordered to be imprisoned or kept to hard labour, the clerk of the crown is to deliver to the person, in whose custody he may remain, a certificate of his name, offence, &c. and such person shall deliver up the offender and the certificate to the gaoler.

4. The clerk of the crown, upon application for that purpose made, is to deliver a certificate containing the name, offence, place of conviction, and terms of pardon; which shall be sufficient evidence of the conviction of such offender.

5. His majesty may remove persons under sentence of death by a naval court martial, but reprieved during his majesty's pleasure, or under order of transportation by virtue of this act, or in confinement under sentence of any court martial, to such places, in such manner, and with such restrictions, as he is empowered to do with respect to offenders under sentence of death, but reprieved during his majesty's pleasure; or under sentence or order

order of transportation, as by an act, passed in the 24th year of his present majesty, intituled, "An act for the effectual transportation of felons, and other offenders, and to allow the removal of prisoners in certain cases, and for other purposes therein specified."

6. The laws, touching the escape of felons under sentence of death, to be applied to offenders under like sentences by a naval court martial, if allowed the benefit of a conditional pardon.

By the mutiny act, his majesty may also change capital punishments, awarded by general courts martial, into transportation for life or a term of years; and if the offender return, before the expiration of his term, he shall suffer death. And when his majesty shall intend such sentence to be carried into execution, or exchanged to transportation, the sentence, with his pleasure, shall be notified by the judge advocate general to one of the judges at Westminster, who shall make the necessary orders, &c. \*

In the army, the king, or commanders in chief, delegated with the authority of convening courts martial, have also the power of ordering a review of the sentence pronounced; but this power is limited, as it is declared, by the mutiny act, "that no sentence given by any court martial, and signed by the

\* Mutiny act (1804), sect. 6.

president thereof, shall be liable to be revised more than once\*." Hence, the sentence of an army court martial is incomplete till it receive the royal sanction, or that of the person duly authorised by the sovereign to approve of the same, and to enforce its execution. Previous to the year 1750, a general commanding in chief was empowered to order the revival of any sentence by a court martial as often as he pleased, and, on that pretence, to keep in confinement a man who had been acquitted upon a fair trial.

That the royal prerogative may be exercised on all occasions, in dismissing officers from the service without putting them to the form of a trial, is unquestionable; and we have already shewn that officers of rank in the navy have been dismissed, even after having been tried by a court martial, and acquitted of the charges exhibited against them †.

By the 17th section of the mutiny act (1804) it is enacted, that no general court martial shall consist of a *less number* than thirteen commission officers, except the same shall be holden in Africa or in New South Wales; in which places such general court martial may consist of any number not less than five, of whom none shall be under the degree of a commission officer: nor shall the presi-

\* Mutiny Act (1804), sect. 12.

† The case of Admiral Earl of Torrington and Rear Admiral Sir John Munden, already noticed.

dent of any general court martial be the commander in chief, nor governor of the garrison where the offender shall be tried, nor under the degree of a field officer, unless where a field officer cannot be had, nor in any case whatever under the degree of a captain.

The reader will perceive that this differs essentially from the constitution of a naval court martial.

For, by the act of \* parliament, no court martial to be held or appointed shall consist of more than thirteen or less than five persons, to be composed of such flag officers, captains, or commanders, then and there present, as are next in seniority to the officer who presides at the court martial. It is also therein contained that nothing shall extend or be construed to extend to authorize and empower the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral, or any officer empowered to hold courts martial, to direct or ascertain the particular number of persons of which any court martial to be held or appointed shall consist.

Among the many reasons, that have been at different times urged, against trials by courts mar-

\* Stat. 22 Geo. II. cap. 33. See abstract of clauses, Appendix, No. II. sect. 12 and 13.

tial, there is no one which, upon a slight consideration, appears more cogent and constitutional than that of the inferior officers, seamen, and soldiers, not having the privilege of being tried by their peers or equals.

But, upon a closer review of the subject, it will appear impracticable to introduce this right, so strongly contended for, respecting the formation of courts martial, without at once altering the whole fabric of the institution; for, if the inferior officer be admitted on the trial of an inferior officer, why not a seaman or soldier on the trial of his brother seamen or soldiers? And it is obvious to every person, acquainted with the practical parts of a naval and military life, that this measure would defeat the end of its formation, and, by a confederacy between the parties, that the power of punishment would be annihilated, and, subordination, the very soul of discipline, be destroyed.

We must recollect too, that a jury so formed, would be in direct opposition to the principle of impannelling juries in our courts of law, where impartiality and disunion of interest are the leading features.

In the present mode of forming courts martial, a powerful objection is raised as to the admittance of seamen or soldiers, since their education and

subordinate

subordinate situations would be incompatible with the dignity and solemnity of a court, where the characters of judge and jurors are necessarily blended.

It has been urged likewise, that officers, below the rank of captains in the navy, have not the same privileges as their brother officers in the army, who sometimes sit as members of a general court martial, provided a sufficient number of field officers and captains cannot be conveniently assembled \* ; since, conformably to the practice in the army, a captain and four, or even two, subalterns, may constitute a regimental court martial †. But whether any innovations, by adopting speculative meliorations of this nature in the navy, would be more efficacious than the present mode established, is problematical.

Military courts martial are either *general*, for the trial of crimes of magnitude ; or *regimental* or *garrison*, for the cognizance of smaller offences. A general court martial is held either by direct authority from his majesty, under the royal sign manual, or by a delegation of the royal authority to a general officer having the chief command of

\* Adye's Treatise on Courts Martial, p. 88.

† Ibid. p. 89.—The Mutiny Act and Articles of War contain no regulations with respect to the rank of officers at regimental courts martial, but the usual practice is as above noticed by Mr. Adye.

a body of forces, within any particular part of his majesty's dominions \*. In the former case the warrant, for holding the general court martial, usually contains the names of the president and all the members who compose the court ; and such warrant is directed to the Judge Advocate General, or his deputy. In the case, where the court is assembled by a general officer commanding in chief, who has the royal authority delegated to him, an order or warrant is directed, by the commander in chief, to the president alone ; and orders are issued, by the same authority, for certain regiments to furnish each a certain quota of officers, of a rank therein specified, to be members of the court, and to return their names to the office of the adjutant general †.

Regimental courts martial are held by virtue of the articles of war ‡, sect. 16, under the head of *administration of justice*: which provide that the commissioned officers of every regiment may, by the appointment of their colonel or commanding officer, without any special warrant from his majesty, hold regimental courts martial for the enquiry into such disputes or criminal matters as may

\* Mutiny Act (1804), sect. 10.

† See forms of warrants under the king's sign manual, also a warrant by a commander in chief, Appendix No. LVI. LVII. and LVIII.

‡ Articles of War (1804), sect. 16. art. 12 and 13.



come before them, and for the inflicting corporal or other punishments for small offences, and shall give judgement by the majority of voices, but no sentence to be executed until confirmed by the commanding officer \*, not being a member of the court martial; and it is likewise declared, that no regimental court martial shall consist of less than *five* officers, excepting in cases where that number cannot be conveniently assembled, when *three* may be sufficient, who are likewise to determine upon the sentence, by the majority of voices †.

Where a sufficient number of officers, of the same corps or regiment cannot be had, the commanding officer or the governor of the garrison, fort, castle, or barracks, may appoint officers, from different corps, to compose the regimental court martial; and the same power is given to the commanding officer in any town or place, with detachments of different corps ‡. The usual practice of constituting a regimental court martial, is to appoint one officer of the rank of captain as president, and the other four members, subalterns, if they can be conveniently assembled; if not a captain and two subalterns will be sufficient to constitute the court.

By the articles of war, his majesty has laid down regulations for constituting another species of mi-

\* Military Art. of War (1804), sect. 16. art. 12.

† Ibid. art. 13.

‡ Sect. 16. art. 14.

litary courts called *detachment* courts martial. These are for trying officers not commissioned by his majesty, or by any general officers having authority to grant commissions, but appointed by warrant under the signature of the colonels or commandants of the corps to which they belong, hence they are distinguished by the appellation of warrant officers \*. It is thereby declared and directed, that, in all cases where the offence charged against any warrant officer may not be of so heinous a nature as to require investigation by a general court martial, such officer may and shall be tried by a detachment court martial, to be appointed by the general officer commanding his majesty's forces in the district where the corps shall be situated, if in Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark or Man, and if in any of his majesty's dominions beyond the seas, or in foreign parts, by the general commanding in chief on the station; which detachment courts martial are to be held and to proceed in the nature of regimental courts martial. Provided that such detachment court martial shall not, in any case, consist of less than five commissioned officers, of whom not more than two shall be taken from the regiment, in which the warrant officer to be tried is serving; that the president of such court martial shall not be under the degree of a field officer; that not more than two of the other members shall be under the degree of a cap-

\* Section 16. art. 15, 16, and 17. Articles of war, 1804.  
tain;

tain; and that no sentence of such court martial shall be put in execution, if the trial shall have taken place in Great Britain, Jersey, Guernsey, Alderney, Sark or Man, until after a report shall have been made to his majesty, and directions shall have been signified thereupon through the commander in chief of his majesty's forces, or (in his absence) through the secretary at war; or if in Ireland, or in any of his majesty's dominions beyond the seas, or in foreign parts, until such sentence shall have been confirmed by the general officer commanding in chief on the station, who is thereby authorised to cause such sentence to be put in execution, or to suspend, mitigate, or remit the same, as he shall judge best and most conducive to the good of his majesty's service, without waiting for further orders: Provided also, that no court martial shall have authority by their sentence to award corporal punishment, in any case of a warrant officer; nor shall a warrant officer be liable to be reduced, by the sentence of either a general or detachment court martial, to serve in an inferior situation, unless he shall have been originally enlisted as a private soldier, and shall have continued in the service until his appointment to be an officer by warrant.

The members of a regimental garrison, or detachment court martial have not, as in trials be-

fore a general court martial, the assistance of a judge advocate or his deputy ; neither are the members or witnesses sworn, as those of a general court martial.

The proceedings are regularly committed to writing, either by the president, or by any of the members of the court named by the president ; and the sentence is signed only by the president. But it is to be remarked that, at naval courts martial, the sentence is always signed by the president and every member composing the court.

As the sentences, of all military courts martial, are not to be put in execution until approved of by his majesty, or the commander empowered to convene such courts ; the court, in the event of disapproval, may be directed to revise the sentence, and reconsider the proceedings : but this power is very properly restricted ; for, as hath been said, it is declared by the mutiny act, that no sentence shall be more than once liable to a revision.

The sentence, of a regimental or garrison court martial, is only subject to an appeal under the circumstances to be hereafter noticed ; and which are positively declared, in the the sixteenth section of the second article of war ; the members should therefore,

in such instance, be extremely circumspect, that their judgment is founded on the principles of military laws and usage, as well as on those of honour and equity.

The cases of appeal alluded to are declared expressly, in one article of war, in the following words\*: "If any inferior officer, non-commissioned officer, or soldier, shall think himself wronged by his captain or other officer, commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is required to summon a regimental court martial, for the doing justice to the complainant; from which regimental court martial, either party may, if he still thinks himself aggrieved, appeal to a general court martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished, at the discretion of the said general court martial†." Hence, we perceive that, in the military code, there is a proper check to ill-founded accusations; for, if the charges be groundless and vexatious, a general court martial has the power of inflicting a discretionary punishment, on the false accuser. In this respect, the military has the advantage over our naval courts martial ‡.

In

\* Military Articles of War, (1804), sect. 16. art. 2.

† Military Articles of War, sect. 12. art. 2.

‡ It is proper to note, that a regimental court martial cannot adjudge a commissioned officer to any punishment, but only, like

In considering briefly the nature and extent of appeals, from regimental to general courts martial, it is apparent, from the second article of war of the 12th section above recited, that the appeal is limited to cases, where an inferior officer or foldier shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs; and he is to complain thereof to the commanding officer of the regiment, who is authorised to summon a regimental court martial, but from which either party may, if he think himself still aggrieved, appeal to a general court martial.

The 12th section of the mutiny act has, however, from its indefinite and general tenor, frequently perplexed military men, relative to the nature and extent of appeals. It is therein declared and enacted, that no officer or foldier, being acquitted or convicted of any offence, shall be liable to be tried a second time, by the same or any other court martial, for the same offence, "unless in the case of an appeal, from a regimental to a general court martial; and that no sentence, given by any court martial, and signed by the president thereof, shall be

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like a court of enquiry, the members give their opinion, whether the charge be well or ill-founded. If the charge be adjudged unfounded, the accuser may still, on the grounds of thinking himself aggrieved or wronged, appeal to a general court martial; and if, on the contrary, the charge be adjudged well founded, the officer accused may appeal to a general court martial.

liable

liable to be revised more than once." Military writers, in comparing and coupling together this last mentioned section of the mutiny act, and the second article of war of the twelfth section, have differed in opinion relative to the import and construction of them. Mr. Adye remarks \*, "to fix the proper bounds (to appeals) is a matter of a very delicate and interesting nature, as well with regard to the soldier as the service. Should it be understood, that appeals are of right due in all cases, much inconvenience might ensue; as conscious offenders would be induced to appeal, merely for the sake of delaying punishment, and would be most apt to do so, when there was either an impracticability or great difficulty of convening a general court martial; and yet, on the other hand, it may not be easy definitively to point out, in what instances they ought to be allowed or refused."

Mr. Sullivan, in his *Thoughts on Martial Law*, takes no notice whatever of the right of appeal.

Mr. Tytler, a more recent writer, in his *Essay on Military Law*, is of opinion, "that an appeal lies, from all sentences of regimental or garrison courts, to general courts martial; and that the members are liable to prosecution for an iniquitous judgment†."

\* Treatise on Courts Martial, part 1. c. v.

† Essay on Military Law, p. 185.

In the chapter relative to appeals from a regimental to a general court martial, Mr. Tytler remarks that, by the enactment of the 12th section of the mutiny act, "it plainly appears that a right of appeal is understood to be competent, from the sentences of regimental or garrison courts, to general courts martial; and, as there is not to be found, in any part of the mutiny act or articles of war, any limitation of this right of appeal to particular cases, or any prohibition of it in others, it must be presumed that a right, thus recognised in general terms, and which is founded both in justice and expediency, is competent, whatever be the matter or subject of trial, to any party who judges himself aggrieved by the sentence of a regimental or garrison court martial \*."

As there is no mention made of an appeal, from a regimental to a general court martial, in any other section of the mutiny act or articles of war, than the two above noticed, we can have no hesitation in forming a decided opinion on this point; so far as the legal right of appeal extends from a regimental to a general court martial, and which appears to be given only in the case mentioned, in the second article of war of the 12th section. If, in strict conformity to the rule of definitions, in all cases susceptible of doubt, we adhere to the literal

\* Essay on Military Law, p. 337.



import, true meaning, and spirit of a subsequent clause or article, illustrative or explanatory of an antecedent one, there can remain little doubt or difference of opinion on this question; since, according to the natural construction to be put on the 12th section of the mutiny act, and the second article of war of the 12th section, framed in consequence of such mutiny act, it evidently appears, that an appeal, from a regimental to a general court martial, extends only to the cases particularly specified in the said article of war.

Moreover, the 24th section of the mutiny act, which empowers his majesty to form, make, and establish articles of war, &c. gives additional strength to this opinion, and puts the question beyond the possibility of a doubt: for no other article, than the second of the 12th section, mentions the right of appeal from a regimental to a general court martial, and that matter is clearly limited to the cases therein specified; and surely the general wording and exception, contained in the 12th section of the mutiny act, cannot by any implication, be construed to confer a right of appeal in any other case, than that which is subsequently enacted, and expressly declared in the second article of war of the 12th section.

By

By the 25th section of the mutiny act, his majesty is empowered to erect and constitute courts martial, as well as to grant his royal commissions or warrants for convening and authorising others to convene courts martial; with power to try, hear, and determine any crimes or offences, by such articles of war, and to inflict penalties by sentence or judgment of the same, &c. Hence, we perceive, that his majesty, thus vested with authority by the legislature, has framed several articles relative to constituting regimental, garrison, and detachment courts martial; namely, the 12th, 13th, 14th, 15th, 16th, and 17th articles of the sixteenth section, in which the principle or right of appeal is in no way whatever mentioned or recognized.

Should an appeal be made, from a regimental or garrison court, to a general court martial, in the only positive case prescribed by the said second article of the 12th section; the simple declarations made by the witnesses, at the regimental or garrison court martial, would then be confirmed on oath, before the general court. All proper questions might be put to the witnesses, and they would be cross examined by the court or the parties. Should it be necessary, additional evidence might be adduced, and the whole proceedings would be recorded by the judge advocate, and sentence pronounced with the same formality, as if the offence were of that magnitude, as to have been in the first instance cognizable by a general court martial.

tial. For small offences, committed by non-commissioned officers or soldiers, such as absenting themselves from their troop or company without leave, drunkenness, neglect of duty, hiring of duty, &c. a regimental court martial has the power of adjudging a punishment proportionate to the offence; and such non-commissioned officer or soldier cannot, after trial, legally demand or make any appeal to a general court martial. Indeed, it is highly expedient, for the good of the service, that, in such instances, non-commissioned officers and soldiers should be precluded from making an appeal. The colonel or commanding officer, who is to approve of the sentence of a regimental court, and in whose breast rests the power of directing a revival of the sentence, or a reconsideration of the proceedings, and of remitting the whole or part of the corporal or other punishment to be inflicted, will always have that proper controul and check over the regimental court, in case the members may have adjudged a punishment that exceeds, in severity, the nature and degree of the offence.

The offences, specified in several of the articles of war, and which are cognizable either by a general, regimental, or garrison court martial, appear, at first consideration, on reasonable grounds, to leave to a non-commissioned officer or soldier, the right of appeal from the inferior to the superior court\*; but

\* Section 2. art. 1.—Sect. 6. art. 4.—Sect. 9. art. 1.—Sect. 13. art. 2, 3. 5.—Sect. 14. art. 1, 2, 3, 4, 5. 8 and 9.

when

when the offender has, in the first instance, submitted to be tried by a regimental or garrison court martial, he ought not afterwards, on the same parity of reasoning already urged, be admitted to appeal from such judgment to that of a general court martial.

If the party, however, before the commencement of proceedings, were to object to be tried by a regimental or garrison court martial, and petition to have his offences tried by a general court martial, then indeed, it would be proper, provided it was not attended with manifest inconvenience to the service, to comply with his request.

Should a non-commissioned officer or soldier, be brought before a regimental court martial for mutiny, desertion, or any of the higher crimes cognizable by a general court martial, he might not only plead the incompetency of the regimental court martial to try him; but, should this regimental court, even without a soldier's availing himself of such a plea, proceed in the trial, and adjudge a punishment for a crime not within the jurisdiction of the court, the members would, collectively or individually, be liable to prosecution in a court of justice, for the illegality of their proceedings. Or, should a non-commissioned officer be ignominiously degraded, and adjudged also to receive severe corporal punishment, by the sentence of a regimental court martial, he might, on the grounds of irregularity,

as well as the excessive severity and injustice of the regimental court in its proceedings, prefer a petition to the commander in chief, stating his grievances, and requesting an appeal from the sentence to a general court martial, and which, the commander in chief could not, with propriety, refuse.

We have a recent instance in point, which happened at the Cape of Good Hope, May 1802. Serjeant Joseph Ginger, of the 34th regiment, was tried by a regimental court martial for disobedience of orders, being out of his barraeks after hours, and for unfoldier-like behaviour to Lieutenant Dawson; he was found guilty and sentenced to be reduced to the ranks, to serve as a private soldier, and also to receive 500 lashes. The irregularity of this sentence was aggravated by Serjeant Ginger, having, for the same offences, previous to the said trial, been degraded by the colonel of the regiment from the rank of serjeant major, to that of serjeant. A general court martial was accordingly assembled to try the appellant, Serjeant Ginger, and the court passed the following resolution: "It having been clearly proved, that the appellant was serjeant major of the 34th regiment, and regularly mustered as such, and tried by the regimental court martial from which he has appealed as a serjeant. It therefore appears to the court, that the proceedings of the regimental court martial were invalid, in as much as that the appellant was not by any sufficient authority reduced, from the rank and pay of a serjeant major

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major to that of a serjeant. The general court martial, therefore, rest their proceedings until this opinion be submitted to the commander in chief, and receive his orders as to any further investigation."

The result, after further investigation had taken place, was, that the commander in chief confirmed the opinion of the general court martial, with respect to the irregularity of the regimental court, directed the proceedings to be cancelled accordingly, and ordered Serjeant Major Ginger to be released, and return to his duty as serjeant major of his majesty's 34th regiment \*.

Several of the military articles of war define expressly those offences, which are cognizable only by a general court martial †; others define precisely such

\* The particulars of this trial are given in Appendix, No. LV. both on account of the singular circumstances attending it, as well as a formula for the mode of proceedings at a general court martial, in cases of appeal.

† Offences cognizable by a general court martial, viz.

In section 1. art. 4. Profaning churches, or offering violence to chaplains. In section 2. art. 1. Traiterous or disrespectful words by officers. 2. Officers behaving with disrespect, to the general or commanding officer. 3. Mutiny. 4. Not suppressing mutiny, or countenancing it. 5. Striking or drawing any weapon against a superior officer. In section 4. art. 2. Officers signing false certificates. 3. Officers making false musters. 4. Commissary or muster master taking money on a muster.

such offences as are cognizable either by a general or by a regimental court martial; others mention a few smaller offences which are cognizable by a regimental court martial; some articles express the offences to be punishable by a court martial, without defining general or regimental; and lastly, there are

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ter. In section 5. art. 1. Officers making false returns. 3. Not transmitting monthly returns to the commander in chief, and secretary at war. Section 6. art. 1. Desertion. 2. Officers entertaining, and not confining deserters. 5. Persuading one to desert. Section 7. art. 4. Resisting officers, in quelling frays and disorders. Section 8. art. 4. Officers making improper exactions from sutlers, &c. 5. Conniving at others selling provisions at exorbitant rates. Section 9. art. 1. Refusing or neglecting to make up accounts. 5. Officers refusing to see justice done, if any person shall be abused or wronged by a soldier. Section 10. relative to carriage on the march. Section 11. articles 1 & 2. Relative to crimes punishable by law. Section 13 art. 1. Commanding officer, storekeeper, or commissary, selling military stores without orders. 4. Warrant officers embezzling or misapplying regimental money. Section 14. art. 7. Officers conniving at the hiring of duty. 10. Sleeping upon post. 11. Violence to any one who brings provisions to camp or quarters; punishment *death*, without any alternative. 12. Forcing a safeguard, punishment *death*. 13. Making known the watch-word, or giving a false one. 14. Making false alarms in camp or quarters. 15. Holding correspondence with an enemy. 16. Relieving or harbouring an enemy. 18. Going in search of plunder. 19. Casting away arms or ammunition. 20. Misbehaving before the enemy. 21. Compelling others to misbehave before the enemy. Section 16. art. 25. Officer breaking his arrest. 18. Commissioned officer cannot be cashiered but by a general court martial.

are three articles of the 16th section, which apply solely to the offences cognizable by detachment

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Offences cognizable either by a general, or regimental, or garrison court martial, viz.

Section 2, art. 1. Non-commissioned officer or foldier uttering traitorous or disrespectful words. Section 6, art. 4. Soldiers absenting themselves from their troop or company. Section 9, art. 1. Demanding billets for quartering more men than the effective number. Section 13, art. 2. Non-commissioned officers or Soldiers wasting ammunition, delivered out for service. 3. Selling or spoiling arms. 5. Non-commissioned officers embezzling money. Section 14, art. 1. Spoiling the property of individuals. 2. Soldiers absenting themselves a mile from camp. 3. Lying all night out of camp or quarters. 4. Not retiring to quarters, at the beating of the retreat. 5. Not repairing at the time fixed to the parade of exercise, &c. 8. Quitting platoon or division without leave. 9. Drunkenness.

Offences cognizable by a regimental court martial, viz:

Section 12, art. 2. Inferior officer or foldier, thinking himself wronged by his captain or other officer commanding the troop or company, may complain to the commanding officer of the regiment, and afterwards appeal. Section 14. Soldier hiring his duty. Section 16, articles 12 & 13. Regulate regimental courts martial.

Garrison courts martial are regulated by section 16, art. 14.

Detachment courts martial regulated by section 16, articles 15, 16, & 17.

Offences cognizable by a court martial without defining general or regimental, &c. Section 1, art. 1. Absenting from divine service, and irreverent behaviour. 2. Swearing or cursing. 5. Chaplain absenting himself from the regiment. 6. Chaplains guilty of drunkenness. Section 7, art. 2. Sending a challenge.

courts



courts martial, with the rules for constituting such courts.

In none of these articles, are there to be found (except in the 2d of the 12th section) one word relative to the right of appeal, from the sentences that may be awarded by these inferior military courts. On the contrary, they expressly declare, that the sentences of regimental, garrison, and detachment courts martial, are not to be put in execution, until they are confirmed by the respective authorities, which directed their being convened: namely, by the colonel or commanding officer (not being a member) of the regimental court martial, or by the governor of the garrison, fort, castle, or barrack, wherein the garrison court martial may be held; and if a detachment court martial, the sentence cannot be put in execution, should the trial have taken place in Great Britain, Jersey, Guernsey, Alderney, Sark, or Man, until confirmed by his Majesty, and directions be given thereupon, through the commander in chief or secretary of war. If in Ireland, or in foreign parts, until such sentence shall have been confirmed, by the general officer commanding in chief on the station.

To institute an inferior, or, what may be termed a divisional court martial, in the navy, analogous to the regimental courts in the army, we apprehend, would not be adequate to the ends proposed; when

it is considered, that, according to the ancient practice of the sea, and as established by the 4th article of the General Printed Instructions, under the head *Rules of discipline and good government, to be observed on board his majesty's ships of war*, a captain or commander of any of his majesty's ships or vessels, has the power of inflicting \* punishment upon a seaman in a summary manner for any faults or offences committed, contrary to the rules of discipline and obedience established in the navy: this power the framers of our naval articles and orders wisely considered preferable, to establishing inferior courts martial for trying trivial offences, as calcu-

\* By the 4th article of the Printed Instructions, under the head of Rules and Discipline, &c. a captain is not to punish a seaman beyond 12 lashes upon his bare back, with a cat-of-nine-tails; but, if the fault shall deserve a greater punishment, he is to apply for a court martial. And though captains frequently punish by inflicting two or three dozen lashes at a time, when the offence is attended with aggravating circumstances, or where it is of such a nature as to fall under different articles; and, upon this latter construction, a seaman may be punished with three dozen for getting drunk, which offence falls under the 2d article, and in that state may disobey his officer, and quarrel or fight with some person in the fleet, which brings him under the 22d and 23d articles; yet, by adhering to the literal import of the Printed Instructions, no more than one dozen of lashes at a time can be legally inflicted by a captain for the fault. It is justifiable only from ancient practice and the usage of the navy, and it may even be deemed lenity in a commander to punish, occasionally, offenders with two or three dozen lashes, rather than bring them to a court martial.

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lated less to obstruct his majesty's service at sea, and as carrying more promptly into execution the rules and articles laid down for its regulation.

Moreover, the public punishment of small crimes is attended with salutary effects, and makes a great impression on men's minds, and, by deterring them from smaller, will effectually prevent the greater.

There is a power which is exercised by captains and commanders, by their own authority, and merely resulting from usage, that has often been a topic of animadversion in the service, that is, the power of degrading a petty or non-commissioned officer, to the situation of an ordinary seaman, or swabber of decks, after he may have been rated on the books, master's mate, midshipman, quarter-master, corporal, gunner's mate, or boatswain's mate, &c. Although this power be not specially recognized by the articles of war, or general printed instructions, yet it having been the usage time immemorially for captains to exercise it, on proper occasions, with due discretion, the justice and policy of the authority may perhaps be admitted. The captain being authorized to rate his ship's company, according to their capacities and merits, and for whose discipline he is responsible, it is but just, that, on conferring on any one a rank, which, by bad conduct or demerits, the non-commissioned officer afterwards forfeits, he that gave such rank

should have the power of taking it away. This authority, however, if abused, or made subservient to the arbitrary will and pleasure of a commanding officer, will bear most peculiarly hard, on young gentlemen, who may have been rated midshipmen, and who, for some trivial offence, may be disgraced by their captain, and ordered to do duty in the waist or forecabin, as common seamen \*. Among the numberless regulations and innovations made by the administration of the Admiralty, under Lord St. Vincent, there is one, respecting the class of midshipmen, which must meet with the approbation of the service, although it certainly encroaches on the immemorial right and patronage of the captains. The regulation alluded to is, the Lords of the Admiralty appointing a certain number of midshipmen to ships, who may have previously served a limited time, and these gentlemen, thus appointed in contradistinction to those rated by the captains, are

\* There was one instance of this nature, that fell within the author's own observation on the Jamaica station, December 1782. A young gentleman (whose father now stands high on the list of vice admirals), was rated midshipman of a frigate, and had nearly served his time; and, on a complaint of a trivial nature having been made against him by a mesmate, he was called before the captain, and, in his own justification, happened to answer rather pertly. The captain immediately degraded him, and ordered him to do duty with the seamen on the forecabin, in which station he continued several months. He was afterwards made a lieutenant by admiral Digby in North America, and at present stands high on the list of post captains; an excellent officer, and an ornament to his profession.

known by the appellation of *Admiralty midshipmen*. A question naturally presents itself, whether a captain or commander of a ship has the same power to degrade or disfranchise a midshipman appointed to his ship, by order of the Admiralty, as one whom he has of his own accord rated? Most unquestionably, the captain cannot exercise such authority, in any other way than by bringing him to a court martial, for any misconduct he may have been guilty of. Thus then we perceive a new distinction of rank and punishment created in the service, and which militates against the established usage, both as encroaching on the captain's patronage, and partially divesting him of the power and discretion he had, of degrading midshipmen without the intervention of a court martial.

It must not however be inferred from hence, that the author is an advocate for the continuance, either generally or partially, of the power with which the captain of a ship has been, from long usage, vested with respect to punishing, by degradation of rank or otherwise, the class of midshipmen in the same manner as they can the other subordinate ranks, of petty or non-commissioned officers; on the contrary it is devoutly to be wished, that the midshipmen were put on a more respectable footing than heretofore, and that no commanding officer should have the power of degrading them, but by the sentence of a court martial. It is therefore to be  
much

ment than degradation from the rank, to which he had been promoted by his captain. This discretionary power it is to be hoped will seldom be exercised but for very solid reasons, and there cannot be much risk of its ever being abused or exercised wantonly, so long as honour and humanity are the distinguishing characteristics of British commanders.

By the military articles of war, and long usage in the army, a familiar power of degrading a non-commissioned officer, and reducing him to the ranks, is vested at all times in the colonel of the regiment. The 18th article of section 16th, under the head of Administration of Justice declares that, "no commissioned officer shall be cashiered or dismissed from our service, excepting by an order from us, or by the sentence of a general court martial, approved by us, or by some person having authority from us, under our sign manual; but *non-commissioned officers may be discharged as private soldiers, and, by the order of the colonel of the regiment, or by the sentence of a regimental court martial, be reduced to private centinels*\*.

\* A commanding officer of marines may also, with the sanction of the captain of the ship in which his party is embarked, degrade a serjeant or corporal for misconduct; but, in such case, it will be necessary afterwards, and by the first opportunity, to assign cogent reasons, to the commanding officer of the division to which the party belongs, that such degradation may be approved and confirmed. The degradation however of a serjeant we think of too much consequence to be done afloat, in the way mentioned, unless by the sentence of a court martial.

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In February 1750, Colonel Townshend (late Marquis Townshend), on the third reading of the mutiny bill, moved, to have a clause added by way of rider, for preventing any non-commissioned officer's being broke or reduced into the ranks but by the sentence of a court martial. Upon this there was a long debate, but the clause moved for was agreed to be withdrawn, and no question was put upon it \*.

Among the Athenians, a general had the power of degrading to an inferior rank, and even of employing in the meanest functions the officer, who dishonoured himself, or was guilty of disobedience †.

The greatest degradation of rank, attended with the most ignominious functions we have on record, was inflicted on adjutant general Jackson, tried for cowardice in the conjunct expedition against St. Domingo, in the year 1655. He was adjudged to be cashiered, to have his sword broke over his head, and to do the duty of a swabber, in keeping clean the hospital ship in the fleet. We shall notice the particulars of this case, in a subsequent chapter, under the head of judging the guilt of crimes‡, &c.

\* See Debrett's Parliamentary Debates, 1750.

† Xenoph. de Magist. Equit. p. 957.

‡ Book II. ch. iii. towards the end.

By the 36th naval article of war, it is declared, "that all other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws in such case used at sea."

By section 24, of the military articles, it is, on similar principles, declared in art. 1, "that no officer, non-commissioned officer, or soldier, shall be adjudged to suffer any punishment, extending to life or limb, by virtue of these rules and articles, except for such crimes as are therein expressly declared to be so punishable within the same." And, by article 2 of the said section, it is likewise declared, that "all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of, by a general or regimental court martial, according to the nature and degree of the offence, and to be punished at their discretion."

In those articles, we see the defects of human wisdom discretely supplied and anticipated by general sweeping clauses, applying to the punishment of those offences, which were not foreseen by the legislature at the time of legislation, and which could not therefore be specifically provided against; and, in order that justice may not be retarded in its course,  
nor



for offences pass with impunity, the old standing customs and usage of the service are directed to be resorted to, in like manner as the unwritten law is made auxiliary to the statute\*.

All naval courts martial are to be held and offences tried in the forenoon, and in the most public part of the ship, where all who will may be present; and the captains of all his majesty's ships in company which take post, have a right to assist thereat†.

The criminal procedure of France, and other countries of Europe, appears, in many instances, to

\* The case of Leonard and Shields, recently adjudged in the court of Common Pleas, has given peculiar energy to the above cited article, for the discipline of the navy. This action was brought for an act of violence, upon the person of the plaintiff (a midshipman), in consequence of his disobedience of an order of the defendant (his commanding officer), and which order was, in itself, of the nature of punishment, viz. ordering him to the mast head, but founded upon the usage of the service. The learned judge observed that the custom of the service justified the order, and rendered the same legal; therefore, the disobeying such legal order justified the measures, taken to enforce it or put it in execution. The jury therefore, without hesitation, returned a verdict for the defendant.

† Printed Instructions, under the head of Courts Martial, art. 4.—In the army, courts martial are also conducted publicly, and are not by law allowed to sit longer than seven hours a-day; and no court can be assembled before eight o'clock in the morning, or sit later than three o'clock in the afternoon, unless in cases which require an immediate example. *Military Articles of War*, (1804), sect. 16. art. 10.

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point out the destruction of the accused. The witnesses are examined privately, and not in presence of the prisoner. But the criminal procedure of England, like that of the Romans, is conducted in a public manner, and evidence examined in presence of the accused. This procedure, as remarked by foreign writers, is open and noble; it breathes Roman magnanimity.

All trials should be public, that opinion, which is the best or perhaps the only cement of society, may curb the authority of the powerful; and the passions of the judges; and that people may say, "we are protected by the laws; we are not slaves:" a sentiment which inspires courage, and which is the best tribute to a sovereign, who knows his real interest\*.

In foreign parts, it is the custom that courts martial do consist only of such flag officers and captains, or commanders of ships, as may be then under the command of the flag or senior officer, delegated with power to hold courts martial, and which usage is the case of necessity. But at home, flag officers and captains of ships have been often called from other ports, to that where the court martial was ordered to be assembled; indeed, this is invariably the rule, when the trial has been upon any

\* Beccaria on Crimes and Punishments, c. xiv.

officer of distinction, or relative to any matters of importance\*.

Admiral Mathews, on being brought to trial, (June 1746) on charges exhibited against him by Vice Admiral Lestock, for breach of duty and misconduct, in an action with the combined fleets of France and Spain off Toulon, stated to the court objections in writing, against three captains sitting as members of the court martial, assembled to try him on the following grounds: 1st, That they were not captains of ships, within the district and limits of the command of the flag officer or commander in chief, who presided at such court martial; and, 2d, That the said captains, objected to, were then captains or commanders of ships, that were out of the district or limits of the commander in chief.

These objections were, in effect, over-ruled by the court; but, from delicacy of the members, they postponed proceeding in the trial, until they had the opinion of the lords commissioners of the admiralty, on the validity of the objections. It will be seen, from the secretary of the admi-

\* On the trials of Admiral Keppel and Vice Admiral Sir Hugh Paliser, the flag officers of the fleet, who were commanding at the Nore, in the Downs, and at Plymouth, at the time the vice admiral preferred his charges, were chosen by the lords commissioners of the admiralty to be at Portsmouth, in a situation to sit as members of the courts martial, by repairing thither and hoisting their flags.

ralty's letter to the judge advocate on the subject\*, that the act of parliament, of the 13 Charles II. which is the foundation of martial law, and for trying offences committed at sea; mentions no such restrictions as are contained in Admiral Mathew's first objection, and says only that courts martial shall consist of commanders† and captains.

2d, That the case, of those captains objected to, was the same as many others in similar instances; who appeared to have repaired from distant places to the port, where the court martial had been assembled, while the command of their ships was left in other hands, during their absence. That, in peace and in port, it had been commonly judged sufficient to intrust the command of ships to the first lieutenants, during the absence of the captains; but that under the then existing circumstances of affairs, their lordships had thought it improper for his majesty's service to suffer those ships to be idle in port, because of the absence of their captains at a court martial, and that they had therefore deputed others to officiate for them by order only, which was so far from divesting their proper captains of their real

\* Vide letter from the secretary of the admiralty, in answer to a letter from the judge advocate, relative to Admiral Mathew's objections to the three captains at his trial. Appendix, No. XVIII.

† By commanders are here meant commanders of the 1st, 2d, or 3d posts; which includes flag officers and commodores.

command,

command, that one of the officiating captains, was only a master and commander, and would not take post, notwithstanding he then acted in the command of a ship of sixty guns.

All complaints at sea, or in foreign parts, upon which the summoning a court martial is to be grounded, shall be made in writing to the commander in chief (unless where the said commander in chief shall see cause of himself to call the same); in which are to be set forth the particular facts, with the place, time, and in what manner they were committed: and if any captain, who is entitled by his rank to sit in the court, be personally concerned in the matter to be tried, he shall not be admitted to sit at the trial\*. Here we discover again the wisdom and precautions of the common law closely adhered to; it being an unalterable rule of law, that no man can sit as judge in his own cause.

It appears to be an established doctrine, that neither the lords commissioners of the admiralty, nor a commander in chief abroad, vested with a power of assembling courts martial, can exercise a discretionary power in rejecting charges or articles of accusation, preferred against any officer, properly drawn up, and specifically pointed. The debates, which took place in both houses of parliament, in

\* Printed Instructions under the head of Courts Martial, art. 4.

December 1779, on the charges preferred by Vice Admiral Sir Hugh Paliser against Admiral Keppel, furnish us with some interesting arguments and observations on this subject \*. It was insisted, on the part of the lords commissioners of the admiralty, that, in all matters of accusation, they were obliged to act ministerially, and had no judicial power; but, when a complaint was preferred, that they were, as matter of course, and in discharge of their office, not only compelled to receive it, but to give the necessary directions for proceeding to trial. Under such circumstances the board had no option: the accusation being once made, they could not reject; they could not qualify; they must have acted just as they did. But it was admitted, that, if an accusation were loosely worded, or inaccurately drawn up; if it were frivolous and vexatious in its tendency, or destitute of specification, then indeed, it might have been the duty of the admiralty to look to the tendency and consequences of such a loose and indefinite charge, to which, from its inaccuracy or want of specification, no proper defence could be made, and from which, consequently, no definite issue could be obtained. But none of these matters, it was contended, held in the present instance. The Vice Admiral Sir Hugh Paliser had preferred an accusation, consisting of five separate articles or charges, properly drawn up and specifically pointed. What then could the admiralty board do? They must either take upon themselves to prejudge the truth of

\* See Parliamentary Debates, December 1779.

This doctrine was censured in parliament by opposition, chiefly upon the ground, that it would establish a principle, which would go to the destruction of all naval service, and to the leaving of every superior officer at the mercy of his inferior.

It was also observed, by opposition, that the lords of the admiralty, finding themselves unable to sustain that monstrous doctrine in its full extent, had, though apparently much against their will and intention, and disguised under loose and vague terms, virtually given it up. For to what less did their acknowledgement amount, than that if accusations were frivolous, vexatious, or unimportant, the board might and would reject them? Either the board is not competent in any instance to judge; or, if competent, the board, in every such act, exercises a discretionary power. The conclusion is clear either way: every thing, which malice, rage, or folly can suggest, is a proper subject to be sent to be enquired into by a court martial; or, the admiralty board have the right contended for, that of judging of the magnitude, extent, and probability of the charge, the circumstances which brought it into

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existence, and every other matter connected with it, which might enable them to be the means of promoting general and particular justice.

It seemed, undoubtedly, to be a singular circumstance, that a great department of the state should, to all appearance, endeavour to narrow its own constitution, rights, and authority ; whilst, on the other hand, its adversaries in the opposition were endeavouring to demonstrate its being endowed with those powers, which it totally disclaimed and denied. The different statutes relative to the admiralty were quoted, examined, and applied on both sides ; and the great crown lawyers rather appeared to defend the measures of the admiralty, than to give a decided opinion as to the restricted power of the board, contended for in the above instance.

It is no less singular that, recently (1798) in the case of Rear Admiral Sir John Orde Bart. the admiralty board, under the administration of the Earl Spencer, denied the doctrine so strenuously contended for as above noticed, when Lord Sandwich presided at the board. Sir John preferred a specific charge or accusation against the Earl of St. Vincent, commander in chief of his majesty's ships and vessels in the Mediterranean, " for having, in his opinion, acted unbecoming the character of an officer, by treating him in a manner unsuitable to his rank, between the 17th day of May 1798, and the 29th of August, both days inclusive," and requested



requested the lords commissioners of the admiralty to order a court martial to try the Earl of St. Vincent for the same. But the admiralty did not think proper to comply with his request \*.

The commander in chief is to order the judge advocate to send, at a sufficient interval before the trial, an attested copy of the charge or accusation to the party accused, in order to his being better prepared for his defence; in conformity to the indulgence allowed at common law, where a copy of the indictment is given to the prisoner. The judge advocate should also inform himself of all the circumstances of the case; and by what evidence the articles of accusation are to be proved, against the prisoner: He ought to require from the prisoner a list of those witnesses, whom he wishes to be summoned in his exculpation; and the witnesses on both sides should be summoned in due time, to give their attendance at the time and place appointed for trial.

Although it is the usage, at important trials by courts martials, to send not only authentic copies of the charges to the prisoner, but also, in many instances, to furnish him with the names of the witnesses to be adduced against him; yet we find that, at the common law, no prisoner in capital cases is

\* See Letter of Accusation and Correspondence with the Admiralty. Appendix, No. XLIX.

entitled to a copy of the indictment, pannel, or any other of the proceedings \*. It was refused to Sir Harry Vane and Colonel Sidney. It was again much urged on the trial of Lord Preston (1690) who desired to have it argued by counsel, which the court unanimously refused, "it being a point that would not bear a debate." By modern statutes, in prosecutions for high treason, a copy of the indictment, with a list of the witnesses to be produced at the trial, and of the jurors impannelled, with the professions and places of abode of the said witnesses and jurors, shall be delivered to the person indicted ten days before the trial†. Further, the same process is given to compel persons to appear for the person accused, as is used to compel them to appear against him; and they shall be upon oath, which was not the usage theretofore.

The course of proceedings, from long established usage at courts martial, assimilate in all other respects so nearly to trials for high treason, that we think it just and reasonable that the prisoner should be, in due time, furnished with the names and descriptions of all the witnesses, to be produced at the trial against him. The judge advocate is to examine the witnesses upon oath, and take down their depositions in writing ‡; he is to take minutes of

\* Foist. p. 228. State Trials, vol. iv. p. 411.

† 7 Ann. c. 22. and 20 Geo. II. c. 30.

‡ Printed Instructions under the head of Courts Martial, art. 5.

the proceedings, in order that the members may recur to them occasionally, to advise the court of the proper forms when there shall be occasion, and to deliver his opinion in any doubts or difficulties which may arise in the course of the trial\*. The functions of a judge advocate, or his deputy, at military courts martial, in form and substance, are similar to those at naval courts martial. Should there be any trivial deviations, they shall be duly noticed. The proceedings of no court martial is to be delayed by the absence of doth any of its members, when a sufficient number remain to compose such court; which is required to sit from day to day (Sunday always excepted), until the sentence be given. And no member shall absent himself from the said court, during the whole course of the trial, upon pain of being cashiered from his majesty's service; except in case of sickness, or other extraordinary and indispensable occasion, to be judged of by the court †.

The members being sworn, pursuant to the prescribed form in the act ‡, to administer justice ac-

\* Printed Instructions, under the head of Courts Martial, art. 6.

† 19 Geo. III. cap. xxxvii. sect. 1 and 2. Appendix, No. II. —By the 17th section of the mutiny act (1804), as no general court martial can consist of a less number than thirteen commissioned officers, except the same shall be held in Africa or New South Wales, it is usual to appoint more members than thirteen, to guard against the death or illness of any member:

‡ See abstract of the clauses of 22 Geo. II. sect. 15.—Ibid.

according to the articles and orders established, without partiality, favour, or affection; and, if any case shall arise, which is not particularly mentioned in the said articles and orders, they are sworn to administer justice according to their consciences, to the best of their understanding, and to the custom of the navy in the like cases. In order that the minds of the younger members may not be influenced, by the opinion of their seniors, the same form is observed as at the trial of a peer, before the house of lords and in determinations of the privy council; for the youngest member is to vote first, proceeding upwards in order to the president, who votes last; and the determination of the court is settled, according to the majority of voices. But, should there be an equal number of votes on each side, and the several members of the court, upon reconsidering the point at issue, adhere to the first opinion, the question remains undecided,

This is consonant to the laws of this realm; where there are a number of judges appointed to adjudge a point of law or fact, the same must be settled and decreed by a majority in the King's Bench, Common Pleas, and Court of Exchequer. There are in each four judges, the chief is vested with superior dignity, not much unlike a president; but in decisions, if two puisne judges dissent from the chief, and one puisne judge agrees with him, no judgement in such case can be given. In the court of delegates, where the lord high chancellor appoints

points a number of judges, if at any time, upon an ordinary act or sentence, the court happen to be divided, no order or sentence can be obtained; though there be always a person of superior distinction, placed at the head of every such commission of delegates. Naval courts martial should therefore observe the same reasonable rules, that other courts of justice comply with: the point at issue may be reconsidered by the same judges; and should they alter their opinions, this may produce a final determination of the point in question; which otherwise must remain undecided\*. At all courts martial, it is customary to have, if possible, the number of members odd or unequal. But it may happen, by the death or sickness of a member, originally making the number of a court martial unequal, that it might be reduced to even or equal numbers, and that there might be an equality of votes. In similar predicaments,

\* In the court of Areopagus at Athens, as likewise among the Romans, we find that the person accused of any crime was acquitted, when the suffrages of his judges were on each side equal.—See *Stanyan's Gr. Hist.* vol. ii. p. 56. and *Kennet's Antiq. of Rome*, p. 130.—And, in the jury of the ancient Goths, there was required only the consent of the major part; and, in case of an equality, the accused was held acquitted. *Black. Com.* b. iii. c. xxiii. p. 376.

In the army, the determinations of courts martial are likewise settled by a majority of voices, except in cases of death, where nine out of thirteen, or two thirds, if there be more than thirteen present, must concur in opinion.—*Mutiny Act* (1804), sect. 18.

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it is the usage of army courts martial to allow the president to have a double or casting vote, where the court is equally divided ; but the opinion of Doctor Paul, on a case of this nature submitted to him, and which happened at a naval court martial in 1746, where there appeared equal numbers, the president included, viz. four against four, goes decidedly to the legality of the questions remaining undecided ; this being, as already noticed, in strict conformity to the laws of the realm, and the usage of the courts of judicature \*.

By the act 22 George II. no member of any court martial, after the trial commenced, could go on shore, or leave the ship, in which the court should first assemble, until sentence was given : but it having been found that this restraint and confinement had been attended with great inconvenience and prejudice to the health of the members, and was so severely felt by those members, who sat on Admiral Keppel's long trial, that they were induced to represent the hardships of the case to the lords of the admiralty \*, their lordships took the proper measures to remedy the inconvenience. And, soon after, the clause of the act alluded to was repealed,

\* See Doctor Paul's opinion upon a case, where an equal number of members at a court martial were on each side. Append. No. IV.

† Vide letter to the secretary of the admiralty. Appendix, No. V.

and

and made void \* ; by which all the members are now at liberty, to retire upon every adjournment.

Military courts martial, once assembled, remain in existence till they are dissolved by the same authority, by which they were held or constituted; and, although the members may have terminated the whole business brought before them at any trial, and pronounced sentence therein, yet they are not at liberty to return to their ordinary duty, or leave the place where the court is assembled, without special leave from the commander in chief, until he signify that the court is finally dissolved. This distinction is necessary in military courts martial; as the sentence may be ordered to be revised, or the members may be directed to intimate publicly in court to the person tried, his majesty's pleasure, or that of a commander in chief delegated with a power to assemble courts martial.

By the third article of the Naval Printed Instructions, under the head of Rank and Command, the first captain to the admiral of the fleet shall be esteemed as a rear admiral; and take place at all councils of war, and courts martial, next to the junior rear admiral.

In consequence of a memorial from the lords commissioners of the admiralty, dated the 3d day

\* 19 Geo. III. c. xvii. sect. 1, 2. See abstract of clauses; Appendix, No. II.

of February 1747, his late majesty gave an order in council, establishing a first captain to flag officers, having the command of a fleet or squadron of twenty ships of the line, with the pay and rank of a rear admiral, and all other privileges and profits belonging to the said post, in the same manner as is allowed to the first captain of the admiral of the fleet; but that the said appointment do continue only during the time of the flag officer's command\*.

As the twelfth section of the act 22 Geo. II. cap. 33. enacts, that no court martial shall consist of more than thirteen, or less than five persons, to be composed of such flag officers and captains then and there present, as are next in seniority to the officer who presides at the court martial; it has at different periods occasioned doubts, in the minds of the flag officers and captains assembled at courts martial, whether the first captain to a flag officer, commanding twenty sail of the line, was vested with a right to take place at courts martial next to the junior rear admiral, in preference to captains, senior to him on the list.

In June 1779, the commander in chief of his majesty's ships and vessels at Portsmouth, entertaining doubts respecting the propriety of Captain

\* Vide letter from the secretary of the admiralty, and order in council, Appendix, No. VI.



Kempenfelt, first captain to Admiral Sir Charles Hardy, sitting at a court martial above a senior captain, wrote a letter to the secretary of the admiralty for their lordships' instructions. The secretary, in answer, transmitted the commander in chief a copy of his late majesty's order in council, establishing a first captain to flag officers, having the command of a fleet or squadron of twenty ships of the line; and referred him to the third article of the General Printed Instructions, under the head of *Rank and Command*, by which Captain Kempenfelt was to be considered as a rear admiral, and to take place at all councils of war, and also at courts martial, next to the junior rear admiral\*.

In October 1790, doubts having arisen, in the minds of several of the flag officers and senior captains at Portsmouth, respecting the legality of Sir Roger Curtis, first captain to Admiral Lord Howe, sitting as a member at a court martial in preference to many captains then present, who were senior to him on the list, they transmitted a case to the lords commissioners of the admiralty, for the opinion of the crown lawyers thereon. This case differed from that of Captain Kempenfelt's, who, by his seniority on the list of captains, came within the number of thirteen members, directed by act of parliament to constitute a court martial: but it was otherwise with

\* See admiralty letter to Sir Thomas Pye, App. No. VI.

Sir Roger Curtis ; as, by his seniority on the list of captains, he did not come within the thirteen members directed to compose a court martial ; and, consequently, it was supposed that he was not entitled to sit at any court martial, where the prescribed number of captains senior to him were present.

The crown lawyers were of opinion that Sir Roger Curtis was not legally entitled to sit, as a member of the court martial \*.

The third case which occurred happened in June 1791, namely, that of Sir Hyde Parker, first captain to Vice Admiral Lord Hood ; who, on being summoned to attend a court martial at Spithead, claimed, on the members seating themselves, to take his place next in rank to the junior rear admiral then present, agreeably to the true purport and meaning of the third article of the General Printed Instructions, under the head of *Rank and Command*. But in this he was over ruled, by a decision of the majority of the officers then assembled ; who were of opinion he ought to take his place in the court, according to his rank as a post captain only, without regard to that superior rank, which the article above referred to gave him. The crown lawyers decidedly gave their opinions that the first captain of the commander in chief, when entitled to sit as a member of a court martial, according to the act of

\* See case and opinion, Appendix, No. VII. sect. 1 and 2.

22 Geo. II. c. 33. has a right to take place next to the junior admiral, and to vote according to that rank\*.

From the perusal of the cases of Capt. Kempenfelt, Sir Roger Curtis, and Sir Hyde Parker, with the respective opinions of the crown lawyers thereon†, we trust those points will appear in a light so clear and unequivocal, as to put them beyond the possibility of doubt in future‡.

The jurisdiction of naval courts martial extends to the trial of all offences, specified in the articles of

\* See Sir Hyde Parker's case and opinion, App. No. VII. sections 3, 4, 5, and 6.

† See the cases and opinions alluded to, App. No. VI. and No. VII. sect. 1, 2, 3, 4, 5, and 6.

‡ It will appear, that the first captain to a commander in chief, when by his seniority he comes within the number of members directed by the twelfth section of the act, to compose a court martial, has a right to take place next to the junior rear admiral.—Capt. Kempenfelt and Sir Hyde Parker were within the number; but the case was otherwise with Sir Roger Curtis, though captain to an admiral of the fleet; as by his seniority on the list he did not come within the thirteen members, directed to compose the court martial on the trial of Lieutenant Bligh.

By the 15th section of the articles of war for the army, entitled *Rank*, it is declared that officers having brevet commissions, prior in date to those of the regiment in which they actually serve, may take place in courts martial, composed of different corps, according to the rank in their brevets; but, in courts martial held by their own regiment, they take rank only according to their commission in the regiment.

war, which may be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in the haven, river, or creek within the jurisdiction of the admiralty; *and which shall be committed by persons then in actual service and full pay in the fleets or ships of war of his Majesty* \*. Likewise, to the trial of all spies, and of all persons whatsoever who shall come and be found, in the nature of spies, to bring or deliver any seducing letters or messages from any enemy or rebel, or endeavour to corrupt any captain, officer, mariner, or other in the fleet, to betray his trust, &c. as specified in the 5th article of war †.

The jurisdiction also extends to the trial of every person who shall be guilty of mutiny, desertion, or disobedience to any lawful command, in any part of his majesty's dominions on shore,

\* 22 Geo. II. cap. xxxiii. sect. 4. Appendix, No. II.

† This article was strongly opposed in parliament (in 1749), when the bill was brought forward, on the principle of giving a dangerous extent to the jurisdiction of naval courts martial; by which it was contended, that it might be easy to accuse any subject of bringing or delivering seducing letters or messages, or endeavouring to corrupt officers, mariners, or others in the fleet, and that whether the person accused was in pay or no, and whether the offence be alleged to have been committed at sea or on land; nay, it was urged that the best lord in the kingdom might, by this means, be subjected to be tried and condemned to die by a court martial. See substance of the arguments on the bill, App. No. LIV.

when

when in actual service, relative to the fleet, and for crimes committed on shore by such persons, in any places out of his majesty's dominions, as are more fully specified in the thirty-fourth and thirty-fifth naval articles of war\*.

Naval courts martial cannot take cognizance of murders, except in cases where the stroke or poison is given *on board ship*, and the person die in consequence thereof *on board*. Hence, if a seaman be stricken or wounded by another *on shore*, and should in consequence die *on board ship*, the aggressor must be delivered up to the civil magistrate of the district, to be dealt with according to law; upon proper application being made to the commanding officer of the ship where such wounded man died †. If the stroke or wound were given on board ship or alongside, and the wounded man afterwards sent on shore, to an hospital or other place where death ensued, the offender must also be delivered up to the civil magistrates; to the end that he may take his trial at the next gaol delivery for the county where such death happened accordingly ‡.

In order to prevent any failure of justice, and for taking away all doubts touching the trial of

\* Vide Articles of War, Appendix, No. I.

† Vide case of John Black of the Foudroyant, Capt. Jervis, Appendix, No. VIII. section 1.

‡ Vide case of Lieutenant Osmond of the Swallow sloop, Appendix, No. VIII. f. 3, 4, & 5.

murders, in the cases herein-after mentioned, it is enacted by statute 2 Geo. II. c. 21. " that where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of that part of Great Britain called England, and shall die of the same stroke or poisoning, within that part of Great Britain called England ; or where any person shall be feloniously stricken or poisoned, at any place within that part of Great Britain called England, and shall die of the same stroke or poisoning upon the sea, or at any place out of that part of Great Britain called England ; in either of the said cases an indictment thereof, found by the jurors of the county of that part of Great Britain called England, in which such stroke or poisoning shall happen respectively as aforesaid, whether it shall be found before the coroner upon the view of such dead body, or before the justice of the peace, or other justices or commissioners who shall have authority to enquire of murders, shall be as good and effectual in law, as well against the principals as the accessaries, as if such felonious strokes and death, or poisoning and death thereby ensuing, and the offence of such accessaries had happened in the same county, where such indictment shall be found ; and that the justices of gaol delivery and oyer and terminer in the same county, where such indictment shall be found, and also any superior court, in case such indictment shall be removed, &c. shall and may proceed upon the same in all points, &c. as they

they might or ought to do in case such felonies, stroke and death or poisoning and death, and the offence of such accessaries, had happened in the same county where such indictment shall be found. And every such offender shall answer upon their arraignments, and have the like defences, advantages, and exceptions, (except challenges for the hundred,) and shall receive the like trial, judgment, order, and execution, &c. as if their (respective) offences had happened in the same county, where such indictment shall be found."

Where one, standing on the shore, shot at another standing in the sea, who afterwards died on board a ship, all the judges held that the trial must be in the admiralty court, and not at common law\*.

At the Admiralty sessions, held at the Old Bailey in the month of June 1785, George Coombes and others were tried and found guilty, for shooting William Allen, master of his majesty's sloop *Orestes*; and it appeared in evidence that the prisoners were supposed smugglers, belonging to two luggers which lay in Christchurch harbour. On the afternoon of the 15th July 1784, William Allen, not being able to get into the harbour with the *Orestes*, manned

\* Coombes' case, 20th January 1786, quoted by East, in his Treatise of the Pleas of the Crown, chap. v. section 131, and Leach's Cr. Cases, p. 300.

his boat, for the purpose of seizing the smuggling luggers ; but, in rowing into the harbour, the boat struck upon a sand bank opposite to the house of one Sellon. Coombes and the other prisoners quitted the luggers, ran on shore with loaded muskets in their hands, concealed themselves behind a wall near Sellon's house, and from thence fired at the king's boat, as they were pushing her from the sand bank, by which firing Allen, who was on board the boat, was killed. The sand bank was in the sea about one hundred yards from the shore, and Sellon's house was about two hundred yards or more from the sea.

Upon this evidence the prisoner Coombes was found guilty ; but several points were raised in his favour, and it was agreed to take a case, and the questions reserved were afterwards appointed to be argued before all the Judges of England.

The questions were, whether, under the circumstances of this case, the prisoner had been properly tried by the admiralty jurisdiction ? Or whether he ought not to have been tried by the common law ?

The Judges were of opinion " that the prisoner was tried by a competent jurisdiction," and which opinion was delivered, on the 25th November 1785, in the exchequer chamber, by Mr. Justice Willes, before Sir James Marriot, judge of the admiralty court,



court, who pronounced sentence of death upon the prisoner, and he was executed pursuant to his sentence \*.

Hence, we are of opinion that a similar case happening to a person belonging to the fleet, would be a subject cognizable by a court martial.

Naval courts martial can likewise take cognizance of crimes, committed by warrant officers, or men belonging to ships in ordinary, of which there have been several precedents †.

As warrant officers and men in ordinary are absolutely in *actual service* and *full pay*, there is little occasion to recur to precedents for a confirmation of the jurisdiction of courts martial to try them for the offences specified in the articles of war; since the 4th section of the act, 22 Geo. II. c. 33 ‡, clearly and expressly extends to all such persons (without exception) in actual service and full pay.

But courts martial cannot take cognizance of offences committed by masters, mates, or seamen belonging to navy transports; for they are persons not subject to naval discipline. They are entitled

\* Leach's C. Cases, 2d Edit. p. 300.

† Vide Case and Letter from Mr. Corbett, late secretary of the admiralty, Appendix, No. IX. sect. 1, 2.

‡ See Appendix, No. II.

to be discharged, in time of peace or war, on their own application. The articles of war, and abstract of the act of parliament, are never stuck up or read on board of navy transports. And though the officers and men receive their wages quarterly at the yards, in the same manner as the officers and men of his majesty's ships in ordinary, yet there is a broad line to be drawn between them.

The recent case (August 1791) of the mate and four seamen, belonging to the Plymouth navy transport, with the different letters and opinions thereon, having thrown some new light on the subject, we refer the reader to the interesting documents, annexed to the subsequent part of this work, for an ample detail of the circumstances \*.

The standing warrant officers of ships in ordinary, viz. purfers, gunners, boatswains, and carpenters, are appointed by the admiralty, and the cooks by the navy board; and, as already noticed, they are amenable to courts martial. The masters of navy transports are appointed by the navy board, and the mates are recommended by the master, and appointed by the master attendant of the dock yard, with the approbation of the board, or of the commissioners resident at the port: the seamen make application to the master attendant, who approves and certifies the same to the commissioner resident at the

\* Vide Letters and Opinions, Appendix, No. X. sect. 1, 2, 3, 4, 5, 6, 7, and 8.

port; and, if it likewise meet with his approbation, he signs the certificate, which is an authority to the clerk of the cheque to enter him. And they are regularly discharged in time of war or peace on their application, consequently are persons not subject to naval discipline.

Naval courts martial can also take cognizance of crimes committed by the officers and men belonging to the Hon. East India Company's ships, having letters of marque in time of war; as well as of those committed by the officers and men belonging to privateers. The acts of parliament\*, which subject the officers and men serving on board privateers, or merchant ships having letters of marque, enact, "that all offences, committed on board of privateers or merchant ships having letters of marque, are to be tried and punished, in the same manner as such offences are tried and punished, when committed on board king's ships. Every offender, however, who is accused of such crimes as are cognizable by a court martial, shall be confined on board the privateer or merchant ship having a letter of marque, until the vessel arrive at some port in Great Britain or Ireland, or can meet with such a number of his majesty's ships of war abroad, as are competent to constitute a court martial. And, upon application made by the commander of such privateer or letter of marque to the lord high admiral, or to the com-

\* 33 Geo. III. c. lxvi. f. 21. 43 Geo. III. c. clx. f. 13.

missioners for executing that office, or to the commander in chief or senior officer of his majesty's ships of war abroad, the said lord high admiral, or any three or more of such commissioners, or such commander in chief, or senior officer, are authorized and required to call a court martial, for trying and punishing such offences. We have an instance of a court martial held on an officer belonging to an Indiaman, which occurred at the Cape of Good Hope January 1798.

Mr. Hugh Atkins Reid, second mate of the King George East India ship, (carrying a letter of marque) was tried at a naval court martial, for having been guilty of mutinous behaviour; disobedience of orders and contempt to Mr. Richard Colnett, commander of the said ship; and also for having insulted the said Mr. Richard Colnett, when in the execution of his duty on shore at Cape Town, by using reproachful and provoking speeches, and for striking him. He was found guilty; but as, for the reasons assigned in the sentence, the court was restrained from passing the sentence of death, positively annexed to a breach of the 22d article of war, he was only adjudged to be imprisoned two years, in the prison of the marshalsea court\*.

The Bill for amending, explaining, and reducing into one act of parliament the laws relating to his majesty's navy, when it was first presented

\* The sentence being of a novel nature, we have inserted it in the Appendix, No. XXXIV. section 11.

to the House (1st Feb. 1749), contained an article rendering the *half pay* officers subject to martial law, in the same manner as if they were on whole pay. As this was a subject that had never been canvassed, it met with strong opposition. The reading of the bill was put off till the 24th Feb. at which time a petition was presented against it by Sir John Norris, and supported by Sir Peter Warren. This petition was signed by three admirals and forty-seven captains\*. In the subsequent

\* The petition presented to the House of Commons by the admirals and captains is as follows :

To the Honourable the Commons of Great Britain in Parliament assembled,

The humble petition of the several admirals, captains, and commanders of or belonging to his majesty's royal navy, whose names are hereunto subscribed,

Sheweth,

That your petitioners, finding, by the Votes of this Honourable House, that a bill hath been brought in, and read a first and second time and committed, intituled, " A bill for amending, explaining, and reducing into one act of parliament the laws relating to the government of his majesty's ships, vessels, and forces by sea," do most humbly beg leave to represent that, in the said bill there are several clauses contained which (should the same pass into a law) would, as your petitioners humbly apprehend, greatly tend to the injury and dishonour of your petitioners, and all other officers of his majesty's navy, as also to the detriment of his majesty's service.

That as the present laws, for the government of his majesty's navy, have been always found sufficient for that end, and the power of the lord high admiral, co-operating with the zeal  
of

quent readings and progress of the bill (April 1749) this article occasioned warm debates, and the minister (Mr. Pelham), beginning to apprehend some disagreeable consequences from the spirit then manifested without doors, yielded to the opposition, and agreed that the article be omitted. The oath of secrecy, and several new clauses, with alterations and amendments then introduced, also occasioned warm debates. The substance of the arguments upon these points, and upon the general necessity and scope of the bill, we have given in the Appendix, deeming it a very interesting and important document illustrative of those topics, and the progress of our naval laws, for regulating courts martial \*; upon which the bill was read a third time, sent to the Lords, and passed accordingly.

of the sea officers, hath been hitherto effectual to secure the service of those on half pay, upon the most pressing occasions, your petitioners humbly hope they shall not be subjected to the many hardships and discouragements that must attend an alteration of the present laws, with regard to them in many particulars.

Wherefore your petitioners most humbly pray, that they may have leave to be heard by their counsel, before the Committee of the whole House, to whom the said bill is committed, against such parts thereof as they apprehend will be injurious to themselves and the rest of the officers of his majesty's navy; or that they may have such other relief as to this Honourable House, in their great goodness, shall seem meet. And your petitioners shall ever pray, &c.

\* See Appendix, No. LIV.

Officers

Officers on half pay in the army were, by the early mutiny acts, subject to martial law; but they are not now amenable to be tried by courts martial, for offences committed during the time they may have been continued on half pay. In March 1749, a clause, entirely new, was introduced into the mutiny bill, which occasioned warm debates in parliament. It ran as follows: "And whereas it may be otherwise doubted whether the officers and persons employed in the trains of artillery, or the reduced officers of his majesty's land forces, or marines, on the British or Irish establishment on half-pay, be within the intent and meaning of this act, for punishing of officers and soldiers who shall mutiny or desert his majesty's service, and for punishing false musters, and for payment of quarters; it is hereby enacted by the authority aforesaid, that the officers or persons employed, or that shall be employed in the several trains of artillery, or reduced officers of his majesty's land forces or marines, on the British and Irish establishments of half pay, be at all times subject to all the penalties and punishments mentioned in this act, and shall, in all respects whatsoever, be holden to be within the intent and meaning of every part of this act, during the continuance of the same."

This clause was represented in a most dreadful light, as being highly dangerous to the constitution,  
and

and as increasing the number of officers dependant upon the crown, and subject to military law. On the other hand, it was thought highly advisable to subject all officers to military law; because it rendered them subject to military discipline, and it was pretty clearly proved that officers on half pay were originally deemed, though not in actual service, to be subject to martial law. What dangers said Mr. William Pitt (the late Earl of Chatham, who was at that time Paymaster General) can happen, by obliging a half pay officer to continue upon the military establishment? It is admitted on all hands that, while he is in full pay, he must employ his time, his study, and even his sword, as his superiors shall direct. There may possibly be danger in this, but it never can happen till the direction becomes wicked, nor prevented but by the virtue of the army. It is to that virtue (continued Mr. Pitt) we even at this time trust, small as our army is; it is to that virtue we must have trusted, had this bill been modelled, as its warmest opposers could have wished; and, without this virtue, should the Lords, the Commons, and the people of England entrench themselves behind parchment up to the teeth, the sword would find a passage to the vitals of the constitution. Upon a division of the House the clause passed.

When this mutiny bill was brought into the House of Lords, the clause alluded to was severely animadverted



animadverted upon, and the judges were then consulted, whether the half pay officers, included in the number of effective men mentioned in the preamble of the bill, could be deemed subject to it, or to any of the pains and punishments mentioned therein, were it not for the last clause contained in the bill then before the House. Upon this question the judges were divided in opinion. The Lord Chancellor was clearly for the affirmative. Some lords thought that, if the clause should pass, provision should be made to compel the government to do justice to the officers upon half pay; by preferring them according to the date of their commissions, and the rank they had in the army. They likewise had great fears lest the clause, if it should pass, would strengthen the hands of the ministry, by giving them power over the half pay officers in the kingdom, many of whom were men of great fortunes and families, which might have a dreadful influence at the general election.

The Earl of Bath, who happened to be Secretary at War during the rebellion in the year 1715, spoke on this question with great ability and precision. A case was urged, in which seven or eight half pay officers, who were taken prisoners at Preston during that rebellion, had suffered death by martial law. The king and the government were so clearly of opinion that they were subject to it; that upon certain rumours, as if those officers would

would be brought up to London, and fined in a civil court, after having been condemned by the court martial, both the Secretary of State (General Stanhope) and the Secretary at War, by the king's orders, sent letters to General Carpenter to put the sentence into execution upon the spot, and even to carry back the prisoners to Preston, if they had already set out for London; which orders were complied with. The Earl of Bath admitted the fact, but was not ashamed to say that he was now of an opinion contrary to what he was obliged to be, by virtue of his office, and he therefore voted against the clause; but it was carried by a majority of 72 against 15.

After this an attempt was made to get a clause inserted in the bill, to exempt any peer of the realm from being tried by a court martial. But this was defeated, and the bill at last passed, and received the royal assent on the 21st March 1749.

In February 1751, on the second reading of the mutiny bill, a debate arose on the clause respecting the half pay officers, in which Sir George Lyttelton (afterwards Lord Lyttelton) made a long speech in support of it. Among the many arguments urged in support of the clause, he observed that the great point, which had been the subject of so much eager altercation, this terrible clause, about which such alarms had been given; alarms that had spread

from the army to the navy, as if it threatened no less than the enslaving of both ; was in truth no more than saying that an officer is an officer, and not a mere civil man ; that he who receives the king's pay, cannot be supposed to be out of his service ; and that he, who is in the king's service, may be commanded to serve him when occasion requires, and cannot be wholly exempt from that military discipline which the necessity of the service demands : these are all the propositions contained in this clause, and which of them can be denied ? It is supposing a government to be out of its senses, to suppose it could give half pay to officers in the manner we give it, if you do not consider it as a retainer, and as an obligation to serve ; for, had the half pay been given purely and simply as a reward for past services, it would then have been given only to veterans, or to such officers as had eminent merit to plead. Is this the case ? We know the contrary ; we know it is given to many who, in the meritorious sense of the word, have not served at all. It must therefore be considered as an obligation to serve, not as an exemption from service, in the general purpose and view with which it was given : but, if it be not a total exemption from service, then there can be nothing more absurd than to suppose there is a total exemption from discipline, where there is not a total exemption from service.

Indeed (continued Sir George Lyttelton) there are some parts of military discipline, from which

an officer when in half pay will be exempt, not by any discharge from the service but by his situation. They cannot have the same operation upon one living retired at his own house in the country, as upon one doing duty in a camp or a garrison; nor would they have it though he were in full pay, so long as he remained in that retreat: but, so far as discipline can operate upon him in such a situation, it certainly does; because he is an officer, because he still retains his commission by which he was first subjected to discipline, and not only receives the wages of government, not only retains the rank he had, but may be promoted from the degree of a colonel to that of a field marshal. While he has all these emoluments derived from the service, is it not reasonable, is it not fitting that he should be bound by its laws? Where is the hardship of this, where is the injustice, where is the servitude? It is unaccountable that an officer should complain of the loss of freedom, of being reduced to the condition of a slave and a janissary, because, while he receives but half pay, he still continues subject to the same law, which he is willing to live under in its utmost extent when he is in full pay. Is not this in effect to declare, that the difference between freedom and slavery may be made up and compensated to him, by the difference between full pay and half pay? But the officers of our army have more generous sentiments.

Good

Good laws, says Machiavel, must be maintained by good arms, and good arms by good discipline. It is a very just maxim, which no government should forget. Late experience has shewn us that, if we had not had good arms and good discipline, our good laws would have been lost; a very different system of laws both civil and military would have been dictated to us by highland legislators, and renegado Englishmen dressed in their liveries \*. It is to this army, it is to this discipline, of which such terrors are conceived, that we owe our delivery from slavery, in its most abject and loathsome form. Therefore the maintaining this discipline, the not suffering it to be relaxed and corrupted in time of peace, is essentially necessary to the safety of the whole constitution; and they who are friends to the one will be friends to the other."

The bill was ordered to be committed, to a Committee of the whole house.

It appears that the clause had in many subsequent mutiny acts been entirely omitted; and, in April 1785, the court martial appointed to try General Ross (respecting a letter written by him, reflecting on General Boyd) met agreeable to their adjournment, to receive the opinion of the twelve

\* This part of Sir George Lyttelton's speech alludes to the fashion taken up at that period, by all the jacobites in England, of wearing scotch plaids for their waistcoats as a party distinction.

Judges of England, on the point submitted to them, viz. Whether General Ross, as an officer on half pay, was subject to the tribunal of a court martial? The Judges gave an unanimous opinion, *that he was not as a half pay officer subject to military law.* They stated their answer on two points, and in both declared it as their opinion, that neither his warrant as a general officer, nor his annuity of half pay, rendered him obnoxious to military trial. In consequence of this, the general was discharged from the custody of the marshal, and the court broke up.

The decision of the Judges in this case was highly interesting, not only to military men in particular, but to the people of England in general. If it had been the opinion of the Judges, that officers discharged from the army on half pay were amenable to military law, and that their half pay was not only a reward for past services, but a retaining fee for future, then the crown would have been invested with a standing army, which, in any contention with the subject, might be called forth without the authority of parliament.

In March 1786, an alteration, introduced into the mutiny bill, for the purpose of subjecting officers who held commissions by brevet to military law, was strongly opposed in both houses of parliament. The earliest mutiny bills included every officer "mustered or in pay as an officer or on half

half pay ;" but, after the year 1751, the latter part of the clause was omitted. In the bill brought in March 1786, instead of the word *mustered* the word *commissioned* was inserted ; by which alteration all those officers, who had commissions by brevet, although out of the service, were made subject to the regulations of this act.

The general ground on which this alteration was supported by the secretary at war, and by the chancellor of the exchequer (Mr. Pitt), was, that though such officers received no pay from the crown, yet, as they might possibly be invested with command, it was necessary they should be made subject to be tried by courts martial, in case of misbehaviour while in command ; and that there were also many other military officers, who were not mustered, such as governors, lieutenant governors, &c. who might eventually exercise command, and that it was highly reasonable that they should, on that account, become amenable to military law, and, as a proof of the expediency of the measure proposed, an instance which had lately occurred was mentioned. Colonel Stewart, a major general by brevet in the East Indies, had in that quality taken upon himself the command of the army in the settlement, in which he was upon service ; and had nevertheless not been deemed liable to be tried by a court martial, had any part of his conduct required that he should be tried.

General Burgoyne, colonel Fitzpatrick, and other members in opposition, urged in objection to the clause, that the whole system of martial law, as it infringed upon the natural and constitutional rights of the subject, was only defensible upon the strict ground of necessity; and ought therefore, in times of peace more especially, to be narrowed if possible, instead of being extended. That the general principle, as recognized both in the theory and practice of our constitution, was that the military law should be confined to actual military service alone. That in ancient times, when every man bore arms and was liable to be called forth, military law was exercised upon every man, while he was in actual service, but no longer. That in our times the militia were under military law when embodied in a militia, but were freed from it, after they returned into the mass of the people, and the character of the soldier was sunk in that of the citizen. That the officers on half pay, though at first included in the mutiny act, had been exempted from its operation, by the deliberate voice of both houses of parliament; circumstances which clearly proved that the prevalent idea, in all ages, had been to confine military law to actual military service,

It was further urged, that there was a peculiar hardship and injustice in subjecting men in civil life, and who derived no emolument from the rank which they held in the army, to be tried by courts martial,



martial, not only for offences at this time known and defined in the articles of war to be military offences, but for offences as yet unknown, which his Majesty had the power hereafter to create. That the act expressly ordered that the articles of war should be read twice in every month, at the head of every regiment in the army; that this measure was doubtless thought necessary, for the purpose of making them familiarly known, to all who were liable to be affected by them, and was therefore a clear proof that the mutiny act, under which the king derives his authority to make such articles of war as he pleased, was never designed to be extended to brevet officers, or officers on half pay; and that, at least, if the innovation proposed should be persisted in, those gentlemen should be apprized of their being about to be made subject to trial by courts martial for a variety of offences, which at present, in their civil situation, were not offences.

In addition to these arguments, it was also remarked that the preamble to the mutiny act confined the standing army to a limited number of men, to be paid by the public; and that the proposed alteration would falsify the preamble, by enabling the executive government to exercise military authority over an additional body of men, not in the pay of the public. In fine, both houses were called upon not to allow that jealousy to be laid asleep with which parliament, ever since a standing army

in peace was first suffered to exist, had always regarded it ; and to take care lest, under pretence of providing against fanciful inconveniencies, they did not connive at a serious attack upon the most important principles of the constitution.

In the house of lords, the bill was opposed in two subsequent debates, with great eloquence and ability, by the earl of Carlisle, Lord Stormont, and Lord Loughborough ; the first of whom proposed, in order to obviate the difficulty of a brevet officer's succeeding to command, without being amenable to military law, that a clause should be added, enacting, that brevet officers should not take command but by virtue of a letter of service, or some special commission from his Majesty. This proposal not being accepted, Lord Stormont moved that, instead of the word " commissioned," these words should be inserted, " mustered or called by proper authority into service;" this amendment he conceived would do away the objections entertained against the proposed innovation, and would surely comprehend all that the executive government could possibly desire.

The clause, as originally framed, was defended by the Lord Chancellor, chiefly on the ground that all the king's forces, however constituted, ought to be subject to the same laws ; that the distinction between an officer by brevet out of service, and an officer

officer in actual service, was an unfair distinction with respect to the latter. If gentlemen chose to have the advantage of military rank, they ought to hold it on the condition of being subject to military law; and, if they disliked that condition, they might ease themselves of the grievance, by resigning their commissions,

This argument introduced another topic of discussion. It was asked, Whether an officer might not, in actual service, give up his commission whenever he pleased? It was answered, by Lord Loughborough, that such a resignation was subject to his Majesty's acceptance; and in this opinion the Lord Chancellor concurred, but added that no minister, under the circumstances described, would advise his Majesty not to accept such a resignation. On the division, there appeared for the original clause 42, against it 20.—Consequently, it is now the established law, that officers, holding brevet commissions, are amenable to the jurisdiction of military courts martial\*.

Naval courts martial take cognizance of all offences committed by officers and soldiers of the army, who may be serving on board his Majesty's ships or vessels of war.

During last war, an instance, however, occurred in the Mediterranean (July 1795) of an officer of

\* See Parliamentary Debates and Annual Registers for 1786.  
the

the 11th regiment of foot, serving on board his Majesty's ship *Diadem*, with part of the regiment embarked for marine duty, being brought to trial by Charles Tyler esq. captain of the said ship, for having behaved with contempt to him when in the execution of his duty. Lieutenant Gerald Fitzgerald, the officer alluded to, denied the legality of the court, and refused to make any defence. The court, composed of four admirals and, nine post captains, over-ruled his objections to their competency to try him; and, having proved the charge, Lieutenant Fitzgerald was adjudged to be dismissed from his Majesty's service, and rendered incapable of ever serving his Majesty, his heirs and successors, in any military capacity \*.

The foregoing trial of Lieutenant Fitzgerald was the foundation of an additional article of war, signed by his Majesty, to be annexed to the code for the army, in the latter end of 1795; on which the Field Marshal, his Royal Highness the Duke of York, ordered certain regulations to be adopted for the government of his Majesty's troops under the said article, who might be *serving on board his Majesty's ships of war*. On these orders being communicated to Lieutenant General Sir Ralph Abercromby, and made public to the fleet at Portsmouth,

\* See Lieutenant Fitzgerald's protest against being tried by a naval court martial; also, the sentence of the court, Appendix, No. XLV. sect. 1. and 2.

by an order from the lords commissioners of the admiralty, enjoining the strictest attention to be paid thereto by the respective officers of the navy; the admirals and captains then present wrote a letter to their lordships, expressing their utmost concern thereat, and giving their decided opinion, that the proposed regulations militated against the principles of the naval service, inasmuch as they appeared to them to be in direct contradiction to the statute for the government of his majesty's ships, vessels, and forces by sea, and must, if endeavoured to be carried into execution, inevitably cause the total destruction of the navy of this country. That, by virtue of the said statute, all officers and soldiers serving on board his Majesty's ships are amenable to a naval court martial, and that they could not imagine that any regulations made by the Field Marshal, his Royal Highness the Duke of York, could have any authority in the fleet, more especially when they are at variance with an act of parliament\*.

In consequence of these strong representations, orders were received for the disembarkation of the troops in several ships, and for replacing them by marines. The law therefore stands as heretofore; and, by virtue of the statute above mentioned, all officers and soldiers, serving on board his majesty's ships,

\* See the correspondence of the admirals and captains at Portsmouth, with the lords commissioners of the admiralty, Appendix, No. XLVI. sect. 1, 2, and 3.

are amenable to a naval court martial, for any offences specified in the naval articles of war.

Additional energy is now given to the statute for the government and discipline of the navy, by the following article relating to troops on service in ships of war introduced of late years into the military articles of war\*. "Whenever any of our forces shall be embarked on board our ships of war, or any other ships, which may have been regularly commissioned by us, and which may be employed in the transportation of our troops; our will and pleasure is, that the officers and soldiers of such forces, from the time of embarkation on board any ship as above described, shall strictly conform themselves to the laws and regulations established for the government and discipline of the said ship, and shall consider themselves, for these necessary purposes, as under the command of the senior officer of the particular ship, as well as of the superior officer of the fleet, (if any) to which such ship belongs."

Notwithstanding this article, commanding officers of troops embarked in his Majesty's ships of war have, in some instances, been tacitly permitted to convene regimental courts martial, on board the ships in which they were embarked. This was most unquestionably contrary to the true spirit and mean-

\* Military Articles (1804), sect. 23.

ing of the statutes 22 Geo. II. c. 23. and 19 Geo. III. c. 17. relating to the government and discipline of his majesty's ships, vessels, and forces by sea, as well as of the military articles of war. The recent case, however, of Lieutenant Colonel Talbot, commanding officer of the second battalion of the 5th regiment, embarked with part of the regiment on board his majesty's ship *Niger*, Captain John Larmour, has decided the question beyond the possibility of any future doubt or difference of opinion, between the naval and military corps.

In April 1800, while the *Niger* lay in Torbay, Colonel Talbot, contrary to the opinion and orders of Captain Larmour, convened, on board the ship he commanded, a court martial for the trial of a serjeant, and broke him; conceiving he had a right to try and break officers, but not to inflict corporal punishment. Captain Larmour, deeming it contrary to the 23d section of the army articles above quoted, represented the circumstances to the lords commissioners of the admiralty. Their lordships laid the case before his Royal Highness the Duke of York, commander in chief of his majesty's forces, who signified his pleasure thereon to Major General Pigot at Torbay, and desired him to cause it to be made known, to the commanding officers of regiments under his command, "that the holding of general or regimental courts martial, on board his majesty's ships of war, is contrary to the rules and discipline of the navy, and is on no account to be practised.

practised. All measures of that nature must be suspended until the disembarkation of the troops; and, in cases where immediate punishments are absolutely necessary for the support of due subordination, it will be advisable that recourse be had to the discipline of the ships, on board of which troops are embarked, to be inflicted under the authority of the respective captains \*."

It is to be regretted that a difference of opinion has often arisen, and still prevails, among naval and military men, with respect to the extent of the authority with which commanding officers in the navy appear to be vested, for punishing soldiers of every description, according to the rules and articles established for the discipline of his majesty's ships of war; or for trying officers or soldiers of his majesty's land forces by naval courts martial, for any offences committed while serving on board king's ships. An instance recently occurred, differing from those already recited, which it is extremely important to both services to notice in a special manner.

A detachment of artillery men having been embarked to do duty in his majesty's bomb vessel *Explosion*, John Brown (a gunner), one of the party, having got drunk, the commander of the

\* See correspondence respecting the conduct of troops when on board of king's ships, Appendix, No. XLVII. section 1, 2, 3, 4, and 5.



bomb vessel punished him the next morning with one dozen of lashes, conformably to the usage and discipline in his majesty's navy. This circumstance Capt. Frazer, commanding the detachment, thought it his duty to state to the Deputy Adjutant General of Artillery, in a letter bearing date the 17th March 1804. The Earl of Chatham, the Master General of the Ordnance, by letter dated the 24th March 1804, transmitting Captain Frazer's said letter to the Earl of St. Vincent, then First Lord of the Admiralty, represented that it appeared that Captain Paul of his majesty's bomb Explosion had thought fit, of his own authority, to punish a gunner of the royal artillery; and he expressed the fullest confidence that his lordship would take such steps as should appear to him most proper to prevent the repetition of a conduct, which, in its consequence, might prove extremely embarrassing to his majesty's service.

In consequence of this representation, the Lords of the Admiralty issued orders to the respective commanders of bomb vessels, to the following effect: "Whereas we think fit, in order that a regard may be paid to the discipline of the bomb vessel you command, by the men belonging to the royal artillery, who may be embarked on board her, that in the event of any such men behaving themselves improperly, they should be confined in such manner as is usual on board his majesty's ships; you are, in case any of the said men should

so behave themselves as to render that measure necessary, hereby required and directed to confine them accordingly, taking care, if the offence should be committed during the time the said bomb vessel should be employed on home service, to transmit to our secretary the particular circumstances of such offence, in order that a proper representation thereof may be made to the Board of Ordnance. But if the offence should be committed during the time the bomb vessel under your command shall be employed abroad, you are in that case to transmit an account thereof to the commander in chief, or senior officer of his majesty's ships, employed on the station where you may be employed, who will communicate the same to the general officer commanding his majesty's troops there, in order that the person or persons so offending may be tried for their conduct by a court martial."

In pursuance of these orders, we find the mode, which has since been invariably adopted by the commanders of bomb vessels, is to prefer their complaint of the misbehaviour of any artillery man to the secretary at the Admiralty, who transmits it to the secretary of the Ordnance. In reply to a complaint of this nature made (April 1804) against John Cairncross, private artillery man on board the Sulphur bomb vessel, the Ordnance board intimated to the Admiralty, that Captain Munro was placed upon the coast expressly for the purpose of receiving

receiving complaints, which, from the difference of the naval and military laws, they had not the means of punishing on board.

Another instance may also be noticed: the secretary of the Admiralty, on the 2d July 1804, transmitted to the Ordnance board a letter of the 28th June, from Captain Jones of the bomb vessel *Prospero*, respecting the ill-conduct of John Hall, a gunner of the royal artillery on board the same ship. The secretary of the Ordnance, in reply, signified that he was directed to transmit a copy of a letter received from Col. M'Leod, deputy adjutant general, royal regiment of artillery Woolwich, on the subject; and which letter, in substance, stated that the officer of artillery, Lieut. Benezet, reported the conduct of the artillery man on board the *Prospero* bomb, and, being unable to form any judgement, he (the deputy adjutant general) referred the letter and complaint to Lieutenant Colonel Terrot, commanding the artillery at Portsmouth; that, he would, upon the return of the ship, take such measures as might be satisfactory to the officer concerned: and he also signified, that the man would be tried the moment he was landed, and of course receive the punishment his crime had deserved.

Having faithfully recited the several instances which have occurred since 1797, wherein the au-

thority of naval commanders to try or punish soldiers according to naval law has been disputed; we apprehend, with all deference to the wisdom of the late orders of the Admiralty, that the matter is by no means set at rest, as to the government and discipline of troops or land forces, that may be embarked in ships of war: because, if it be admitted (and which was virtually the case) that the additional article of war, signed by his Majesty in 1795, intended to be annexed to the code for the army, and that his Royal Highness the Field Marshal's regulations for the government of his Majesty's troops under that article, who might be serving on board ships of war, together with the order from the Admiralty in pursuance thereof, were at variance with the statute, by virtue of which his Majesty's ships, vessels, and forces by sea, are governed; the same valid objections must be admitted to hold good against the recent order issued by the admiralty, respecting artillery men serving on board bomb vessels. The representation made to the Admiralty by the flag officers and captains at Portsmouth, 3d Nov. 1795, on the occasion alluded to, and noticed in the preceding pages, conveyed in the most energetic language the sentiments of the whole naval corps, namely, "we feel it a duty, we owe our King and country, to represent to their lordships our firm and decided opinion, that no modification of the statute, by virtue of which his Majesty's ships, vessels, and forces by sea, is governed,

verned, can be made, whereby the long established authority of the naval officers may be diminished, without involving the destruction of the navy of this country; and we are of opinion, notwithstanding the regulations which have been ordered to be carried into effect, that, by virtue of the statute above recited, *all officers and soldiers serving on board his Majesty's ships are amenable to a naval court martial*, for we cannot imagine that any regulations, made by the Field Marshal his Royal Highness the Duke of York, can have authority in the fleet, more especially when they are at variance with an act of parliament."

Therefore, on a point of so much delicacy, wherein such high and respectable authorities have differed, it might be deemed presumptuous to hazard a decided opinion, as much may be urged on both sides of the question, from the circumstances that neither the statute for the government of his Majesty's ships, vessels, and forces by sea, the mutiny act, nor the military articles of war, are, we conceive, sufficiently explicit on those subjects; and it is to be devoutly wished that on a future legislative revision of those acts, the matters in question may be clearly defined, so as to obviate every doubt or discussion that can possibly arise, to disturb that good understanding and harmony which, for the glory and advantage of the State, ought to prevade every rank in both services, so

long as they are depending on the mutual co-operation of each other \*.

By the mutiny act, it is now enacted, "that every person, who is or shall be commissioned, or in pay as an officer, or who is or shall be enlisted, or in pay, as a non-commissioned officer or soldier," is amenable to trial by a court martial †.

The decision of the court of Common Pleas, in the case of Samuel George Grant, who, acting as a serjeant in recruiting for the service of the East India Company, enlisted two drummers belonging to the Foot Guards, while he was receiving pay as a serjeant of the 74th regiment, has illus-

\* In 1795, the troops serving on board the ships of war were, in consequence of the above disputes, disembarked and replaced by marines.

It is now in contemplation, to have a certain proportion of the royal marines trained as artillery men, by which, and an augmentation to this useful corps, the naval service may, in a short time; become in a manner independent of land forces. This, while it will be a measure more homogeneous to the service, must be attended with great advantages, on all expeditions of a secret nature, when not upon too extensive a scale. At the same time it is to be ardently wished that, in all great armaments wherein the conjunct operations of navy and army may be necessary, the lines of demarcation, both with respect to discipline and prize concerns, should be clearly defined by the legislature, so as to obviate every point of difference that has heretofore unfortunately arisen, and thereby to prevent all future discussion or litigation.

\* Mutiny Act (1804), sect. 1.

trated,

trated, and given additional energy to the above clause of the mutiny act. Grant was brought to trial, by a general court martial held at Chatham barracks, and sentenced to be reduced from the rank and pay of a serjeant, and to serve as a private soldier in the ranks; and he was further adjudged to receive one thousand lashes, on the bare back, with a cat-o-nine-tails. This case gave rise, as we have noticed, to a motion in the court of Common Pleas, for a prohibition to prevent the execution of the sentence, on the following grounds,

1. That the plaintiff Grant was not a soldier, and therefore not liable to be tried by martial law.

2. That evidence was received against him contrary to the rules of the common law; and evidence for him, which was admissible, was rejected.

3. Supposing him to have been a soldier, yet he ought not to have been convicted of any offence, with which he was not specifically charged previous to his trial.

4. The offence of which the plaintiff was convicted, is not an offence cognizable by martial law.

The learned Judge, (Lord Loughborough,) in delivering the opinion of the court, decreed, that the prohibition ought not to issue, chiefly on the principle of its being clearly shewn that Grant was

in pay as a soldier, and as such fixed with the character of a soldier; and that, if once he become subject to the military character, he never can be released but by a regular discharge.

In this interesting cause, the counsel for Grant, Serjeant Marshal, with great ability and ingenuity, argued the several grounds, in support of the motion, and quoted the first edition of this work, in two or three instances, more especially in his arguments on the second and third heads above mentioned\*.

The substance of these arguments, together with the opinion of the court, as delivered by the Lord Chief Justice (Loughborough), we have already given in the preceding part of this chapter.

By stat. 22 Geo. II. c. 33. section 23. No person can be tried for any offence, unless the complaint be made in writing, and a court martial ordered within three years after the offence shall have been committed, or within one year after the return of the ship to which the offender belongs, into any of the ports of Great Britain or Ireland, or within one year after the return of such offender. Hence we perceive the wisdom and humanity of the legislature, in guarding against acts of oppression and malice, by keeping charges against any offender in reserve for too long a period, and afterwards

\* See Grant's case, Trinity Term Reports, June 16th, 1792.  
bringing



bringing them forward collectively, when he might be deprived of the means of exculpation \*.

All commissions or general powers, for holding courts martial, are to be understood to be in force no longer than during the expedition †.

When the commanding or senior officer in foreign parts is, from the causes specified in the 9th and 14th sections † of the act of 22 Geo. II. obliged to preside at a court martial, the form of the order which he issues for assembling such court differs from that coming from the Admiralty, or from a

\* The time for the prosecution of offences is also limited in the army by the mutiny act, which declares, "that no person shall be liable to be tried and punished for any offence, against any of the acts or articles of war, which shall appear to have been committed more than three years, before the issuing of the commission or warrant for such trial; unless the person accused, by reason of his having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period; in which case such person shall be liable to be tried at any time, not exceeding two years after the impediment shall have ceased." Mutiny act (1804), sect. 95.

† Sir Walter Raleigh, when appointed governor of Guiana, had a power rarely entrusted to our admirals now, viz. that of exercising *martial law*, in such manner as the king's lieutenant general by sea or land, or any of the lieutenants of the counties of England, had.—*Campbell's Admirals*, vol. i. p. 817.—*Hackluyt*, vol. iii. p. 733.

† See Sections of Acts of Parliament, relative to Courts Martial, Appendix, No. II.

commander in chief, directed to the second or third in command\*.

By the said fourteenth section of the act, a court martial cannot be held at any place where there are not less than three officers, of the degree and denomination of a post captain, to make up the number of five captains and commanders to compose a court martial.

And Judge Bathurst is clearly of opinion †, that a court martial may be regularly appointed at any place where there are three post captains present, and one of these at the time commanding a sloop only.—The sixth article of the printed Instructions, under the head of Rank and Command, directs “commanders of fire-ships, sloops, yachts, bomb vessels, hospital ships, store ships, and other vessels, though they may have commanded ships of post before, shall be commanded by junior captains in ships of post, while they keep company together, either in port or at sea, but without prejudice to their seniority afterwards.”

But, though this article deprives them of their seniority for the time they command any of the

\* See form of Admiralty orders, Appendix, No. XXIV. sect 1. and 2; and forms of warrants for holding military courts martial, Appendix, No. LVI, LVII. and LVIII.

† See Case and Opinion, Appendix, No. XI.

before-mentioned ships and vessels, it does not expressly deprive them of the rank and degree of post captain, even for that time. It is therefore, by the construction of the article, obvious that these commanders are to be considered as the junior post captains, and, as such, may take place at a court martial.

The privileges of parliament do not protect a member, belonging to the army or navy, from being amenable to a court martial, for offences committed in his naval or military capacity. But, previous to the arrest of any member, in order to try him for a military crime, it is usual to give notice to the house, of which he is a member, with a request, for the expediency of public justice, that the members will consent to his being put under arrest for trial. A precedent of this nature occurred in the last session of parliament (June 1803) of the notice given, for the trial of Capt. Barlow of the army for certain offences. And, more recently, we have the case of General Burton, who was tried for challenging an officer of inferior rank. On this trial, the second very properly declined answering any question, tending to criminate himself, and the General was found guilty, from the evidence of his own confession only.

In the navy as well as in the army, officers, who may have been suspended, and who shall in that interval commit any offence specified in the articles

of war, are subject to be brought to trial at courts martial.

This is reconcilable, on the principle of considering the suspension of an officer, as a temporary deprivation of his rank and pay, without annulling his commission: and, on similar principles of justice, an officer, who may be suspended, and feels his character unjustly impeached, may demand an investigation of his conduct by court martial; and which, if not attended with manifest injury to the service, ought to be granted, that an opportunity of justification may be afforded.

Lord George Sackville, having been suspended and divested of all military employ, and finding his character to be so impeached, in the public opinion, demanded an enquiry into his conduct; which the King, from motives of justice and humanity, and a regard to the reputation of an officer of such high rank, readily granted.

Captain Norris, of the *Essex*, even after having resigned the command of his ship, in the Mediterranean (February 1744) finding his character had been aspersed by his officers, in the engagement off Toulon, applied to the Admiralty board, for a public investigation of his conduct; and a court martial for that purpose was accordingly ordered \*.

\* See particulars, Appendix, No. XII.

As it has been the usage to afford captains in the navy the means of justification, by granting them a public enquiry into their conduct, when superseded or divested of the command of their ships, for supposed misconduct; how much more necessary doth it become to grant a similar opportunity of vindication to flag officers, more especially to those who may be entrusted with high and important commands? Indeed this has been the general practice, unless where political prejudices, and personal animosities, have unfortunately intervened to warp the minds of men in power.

To posterity, doubtless, the following circumstances will appear enigmatical and paradoxical; namely, that a naval commander in chief of high character, uncommon zeal, and distinguished services, who, on the 10th day of April 1801, should be honoured with the vote of thanks of both Houses of Parliament in the following words, "that the thanks of this House be given to Admiral Sir Hyde Parker, for the able and judicious disposition, made by him, of the fleet under his command, by which the Danish naval force, and floating batteries, forming the line of defence, at the entrance of the harbour of Copenhagen, were taken or destroyed on the 2d day of April 1801;" and that, although the said vote of thanks was moved in the House of Lords by the Earl St. Vincent, first lord of the Admiralty, who had also by private letter to Admiral  
Sir

Sir Hyde Parker, dated the 17th day of the said month of April, "congratulated him on the complete success of the bold design, and daring execution of the attack, on the line of defence before Copenhagen, which had received the most marked approbation of his Majesty, of both Houses of Parliament, and of the whole kingdom: yet that most unexpectedly Admiral Sir Hyde Parker received an Admiralty order, dated the 21st of April, superseding him in his command, and ordering him to return to England in a frigate. This extraordinary measure excited much public attention, both in and out of parliament. It was even said by Mr. Tierney, on demanding an explanation in the House of Commons, (May 20th 1801,) "that the very ship that carried out those thanks, carried out orders to admiral Parker to return home; and that it appeared to him, the dignity of the House was concerned in this business, and that ministers were bound to explain what appeared to him to be a great inconsistency in their conduct \*.

The

\* Debrett's Parliamentary Register, 1801, vol. xv. p. 364. We find that Mr. Tierney was under a mistake, in the first part of his statement, as the vote of thanks to admiral Parker, accompanied with letters from the lord chancellor, and the speaker of the house of commons, were not received by the same conveyance which carried his order of recall; but there was only an interval of a few days between the receipt of the vote of thanks and the admiralty order of recall. And the difference only of three days between the date of the first lord's letter of congratulation,

The circumstance of an admiral, commanding in chief, being so suddenly and unexpectedly superseded, after his conduct had been publicly approved of; at a time too, while the eyes of all Europe were dazzled with the brilliancy of the achievement, this circumstance appeared to every unprejudiced mind, both in and out of parliament, a measure extremely inconsistent and enigmatical, and doubtless, as Mr. Tierney observed, the dignity of Parliament was concerned in the business. Moreover, it is to be remarked that Mr. Addington (now Viscount Sidmouth,) the minister, in moving the vote of thanks said, very deservedly, that no achievement of the present war, coupled with all its circumstances, had contributed more to the advancement of our interests, to the glory of our efforts, or towards sustaining the contest in which we are engaged, and bringing it to a glorious termination, than that to which he was then calling the attention of the House \*.

Feeling his character affected, and that he must suffer much in the public opinion, from so abrupt a recal; as well as from the insinuations industriously propagated on such an occasion, which he was aware, with the credulous part of mankind, might, if not repelled, gain additional force, and ultimately

congratulation, extolling his conduct, and the order of recal; the former dated the 17th of April, and the latter bearing date the 21st of the same month!

\* Debratt's Parliamentary Register 1801, vol. xv. p. 96.

a degree of general belief, Admiral Sir Hyde Parker thought it his duty to state in forcible language his injured feelings to the Lords Commissioners of the Admiralty, and to entreat that their Lordships would be pleased to appoint a Court of Enquiry to investigate his conduct in the Baltic, from the 2d day of April to the 5th May 1801, on which last day he quitted his command \*. But his request was positively refused by that power, which had a few weeks before, with one breath, extolled his zeal, skill, and judgment in the judicious disposition of the attack at Copenhagen, and had in another breath ordered his doom to be sealed, by recalling him from a most important command.

The motives, therefore, whether of a political or private nature, have been left to the maze of public opinion and conjecture; and those motives still continue to be enveloped in mystery and obscurity.

We have in a former part of this work mentioned the undoubted prerogative of the King, to dismiss officers from the naval or military service, without trial by court martial. But surely an officer of high rank, whose zeal, skill, and judgment have been conspicuously manifested on all occasions, during a long and active life in his Majesty's naval service, and of which the two Houses of Parliament bore so honourable a testimony in the affair

\* See Admiral Sir Hyde Parker's Letters to the Admiralty, Appendix, No. L.



last noticed, was, on every known constitutional principle and practice, as well as on that of justice and equity, entitled to have an impartial investigation of his conduct. This was the more necessary to be complied with, as an implied or negative censure was attempted to be fixed on his reputation; by withholding all marks of royal favour from him, whilst they were most honourably and deservedly conferred upon the junior admirals.

Several instances having recently occurred, in the military service, of officers sent home, by Commanders in chief on foreign stations, with articles of accusation pending against them, but not duly investigated, his Royal Highness the Duke of York, conceiving the discipline of the army and the interest of his Majesty's service to be thereby materially affected, was of opinion that this practice, except in cases of the most urgent necessity, ought to be avoided: because though it might relieve the Commander on the spot from some embarrassments, the measure seldom failed to transfer them to head quarters with increased difficulties. And his Royal Highness the Field Marshal judged it further expedient to express, in general orders of the 1st February 1804\*, his disapprobation of the erroneous opinion, which had prevailed in the army, that an officer who has been put under arrest, has a right, as it is termed, to *demand a court martial upon*

\* See General Orders, Ap. No. LIII.

*himself,*

*himself*, and may persist in considering himself as still under the restraint of such arrest, although expressly released therefrom by the superior officer who imposed it: whereas the fact is, that a superior officer is invested with a discretionary power of liberating, as well as of arresting, and of requiring that the officer so liberated do return to the exercise of his duty as before; and neither can an officer insist upon a trial, unless a charge be preferred against him. It by no means follows however, that an officer, conceiving himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy. A complaint is afterwards open to him, if preferred in a proper manner, for which provision is made by a special article of war \*.

It

\* One of the recent instances alluded to, and which it is presumed gave birth to the above general order, was the circumstance of Governor King, of New South Wales, sending home Captain John M'Arthur of the New South Wales Corps, for having accepted a challenge, and wounded in a duel his superior officer, Colonel Paterfon of the same corps, and Lieut. Governor of the colony. Capt. M'Arthur's case was attended with aggravating circumstances, in his having been sent to England under arrest, on board a ship making a circuitous voyage by India, which was protracted for upwards of eight months, and forced also to leave his wife and family in the colony, together with a considerable property, acquired by a laudable and exemplary attention to agricultural pursuits, and the rearing of several thousand sheep of the real Spanish breed, on a soil by nature and climate congenial

It is unnecessary, in this place, to make farther comments on the crimes cognizable by naval or military courts martial, or upon the articles of war, and different sections of the acts of parliament establishing courts martial, with which every officer is presumed to be well acquainted. But, as it is a matter so essentially important to both services, as well as to the individual members who may sit at courts martial, to have a competent knowledge of the legal forms of procedure against offenders, we shall endeavour, in the subsequent chapters of this work, as well as in the appendix of forms and opinions at the end, to follow the order and course of the proceedings themselves, as the most clear and perspicuous mode of treating the subject. And, where the acts of parliament, articles of war, or printed instructions and regula-

genial to the growth and production of animal wool, equal in texture and quality to the finest produced in the same latitude as Spain and Portugal. This is an object of the greatest national importance, considering that nearly two millions sterling is exported annually to foreigners, for the purchase of fine wool, and that about three millions of the population of this kingdom are employed in the woollen manufacture and trades connected with it; and which, if duly appreciated by government, and proper encouragement given, may be rendered a source of immense wealth to individuals, and of great advantage to the manufactures and revenue of the country. For further details of the advantages resulting from this discovery, and the experiments made by the individual alluded to, as ascertained by documents laid before parliament in the Woollen Clothier's Bill (1803), we refer our readers to the preface of the 4th edition of *Financial and Political Facts of the Eighteenth and present Century*.

tions, regulating the proceedings of courts martial, are ambiguous or do not apply, it may not be improper to throw occasional glances at the proceedings of other courts of judicature in the kingdom, under similar circumstances, as a rule of conduct to be observed at courts martial. This may be deemed an important part of our task, since we have instances on record, of councils of war having been even censured by parliament\*, for deviations in their forms, and for errors in judgment; and the more so, when we consider the many informalities members of courts martial are unknowingly liable to fall into on foreign stations, where they may not have the opportunity of being assisted with a judge advocate, sufficiently versed in the legal forms of proceedings. This is a con-

\* In 1699, Commodore Norris was censured in the following terms, by the House of Lords, for joining land officers in the council of war, who negatived fighting the French squadron off Newfoundland, commanded by M. Pointis. In this council there were thirteen sea officers and eleven land officers: the commodore and seven of the captains voted for attacking; but all the land officers, and five sea officers, voted negatively.

*"Die Lune, 17th April 1699.*

1. "It is resolved, by the lords spiritual and temporal in parliament assembled, that the squadron commanded by Capt. Norris, at St. John's, in Newfoundland, not going out to fight Pointis, upon the several intelligence given, was a very high miscarriage, to the great disservice of the king and kingdom.

2. "It is resolved that the joining the land officers in the council of war, on the 24th July 1697, was one occasion of the miscarriage in not fighting Pointis."—*See Campbell's Admirals*, vol. ii. p. 475.

sideration

sideration of the greatest moment ; as, in case of illegality in the proceedings of a court martial, of apparent partiality in its judgment, or of any flagrant abuse of its authority, the court is not only liable to the severe animadversions of the house of commons, but the members of such courts martial are either collectively or individually amenable to the laws of their country.

There are several instances where the informalities and illegal proceedings of courts martial have been severely censured by the legislature, as well as brought under the cognizance of the civil courts. Soon after the engagement off Toulon, (February 1744,) Captain Norris resigned the command of the *Essex*, one of the ships in that action, on account of ill health, with an intention to return to England ; but, learning how much his character had been aspersed by his officers, he applied to Vice Admiral Rowley, then commanding officer in the Mediterranean, for a court martial to enquire into his conduct on the day of action.

As Captain Norris had resigned his command, the Vice Admiral did not conceive he had power to order a court martial to be assembled, without orders from the Admiralty.

Captain Norris made application to the Admiralty, and a commission was granted for Vice Admiral

Rowley's assembling a court martial, to enquire into the conduct of Captain Norris, and, upon the 28th January 1745, a court martial was accordingly assembled at Mahon, composed of the Vice Admiral and twenty-five Captains \*.

The court, after proceeding several days in examining witnesses, conceived doubts, whether they could legally come to any determination on the matter before them; as Captain Norris was not then in his Majesty's service and in full pay. The court, therefore, came to the resolution, to transmit the whole minutes of their proceedings on this enquiry to the lords commissioners of the Admiralty, without passing sentence. Lieutenant Jekyl the prosecutor, and the other lieutenants of the ship, remonstrated to the Admiralty against the treatment they had received; and the papers having been laid before the House of Commons, the proceedings were not only censured as partial, arbitrary, and illegal, but, on the vote of the House, his Majesty was requested to give directions to try, by a court martial, Captain Norris, and the other captains and officers, who had been accused of bad conduct †.

\* Previous to the act 22 Geo. II. c. 33, the *minimum* of members to constitute a naval court martial was, like the number at present in the army, fixed to thirteen. It was therefore the usage to have all the captains on the station to attend as members, without regard to numbers, provided they were not less than thirteen; but the naval law, as now altered by statute, is, that a court shall not consist of more than thirteen members.

† For further particulars, and the names of the members composing the court martial censured, see Append. No. XII.

Military

Military and naval courts martial are also subject to the controul and jurisdiction of the supreme courts of King's Bench and Common Pleas; and the members are liable to punishment, for any wanton abuse of power or illegal proceedings. We have, among the many instances of the judgments of courts martial which have been brought under the review of the civil courts, a remarkable instance in the case of Lieutenant Frye of the marines.

In the year 1743, Lieutenant Frye, serving on board the Oxford man of war, was tried at Port Royal, Jamaica, for disobedience to his captain's orders, namely, in refusing to assist another lieutenant in conducting an officer as a prisoner on board the ship. Lieutenant Frye persisted to have a written order for this duty from the captain, which he peremptorily refused. On his being brought to trial for this offence, the evidence produced against him at the court martial consisted of the depositions of a parcel of illiterate people, reduced into writing several days before he was brought to trial, which persons were entirely unknown to him, he to his knowledge never having seen or heard of them before; and upon his objecting to the evidence, he was brow-beaten and over-ruled. On the charge being thus proved, he was sentenced to fifteen years imprisonment, and rendered for ever incapable of serving his Majesty. He was brought home, and his case, after being laid before the Privy Council, appeared in so justifiable a light, that his

late Majesty was pleased to remit the punishment, and to order him to be released.

Some time after, he brought an action in the court of Common Pleas, against Sir Chaloner Ogle, who had sat as president at the court martial, and had a verdict in his favour of 1000*l.* damages; it having been proved, that he had been kept fourteen months in close confinement, before he was brought to trial. The judge moreover informed him that he was at liberty to bring his action against any of the members of the said court martial, he could meet with.

On his application afterwards, (May 1746), the Lord Chief Justice (Willis) issued his writ of *capias* against Rear Admiral Mayne and Captain Rentone, two of the members who had sat at his court martial, and they were accordingly arrested just as they broke up from a court martial, assembled at Deptford for the trial of Vice Admiral Lestock. This was deemed a great insult, and highly resented by all the members composing the said court martial at Deptford; who drew up strong resolutions on the occasion, which they transmitted, with remonstrances, to the lords commissioners of the Admiralty. The Admiralty, through the medium of the secretary of State, laid those resolutions and remonstrances before his Majesty. The lord chief justice, however, being apprized of the steps which the members of the court had taken, immediately,



mediately, and without waiting the result, exercised the authority of his high office, and caused each individual member to be taken into custody, and was proceeding in legal measures to assert and maintain the authority of his judicial power, when a stop was put to the process, by proper concessions expressed in a submissive letter, signed by the president and all the other members of the court, and transmitted to the lord chief justice; which letter was ordered to be registered in the remembrance office—A memorial, as the lord chief justice then observed, “to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken \*.”

Indeed, so provident have the laws of England been framed in favour of the liberty of the subject, as well as for the prevention of any arbitrary exertion of power, by those to whom the administration of justice is committed, that we have instances in history of chief justices and judges having been impeached by the House of Commons, and having incurred exemplary punishments by the sentence of Parliament, the highest of all tribunals, for having

\* For the particulars of Lieutenant Frye's case, with the letter and members names, which, with the acceptance of the lord chief justice, was inserted in the Gazette, 15th November 1746, see Appendix, No. XIII.

ventured to infringe the laws \*. Hence it is indubitable that neither the authority, influence, nor personal dignity of the infractors of the law, can screen them from the animadversions of Parliament, whose power is so transcendent, that, at times, even sovereignty itself has not escaped its censure †.

\* In the reign of Edward the First, Sir Ralph de Hengham, chief justice of the King's Bench, was convicted of having committed exactions in office, and fined 7000 marks. Sir Thomas Wayland, chief justice of the Common Pleas, had his whole estate forfeited, and Sir Adam de Stratton, chief baron of the Exchequer, was fined 34,000 marks.

Under Richard the Second, Sir Robert Tresilian, chief justice of the King's Bench, and some other judges, were convicted of having been instrumental, in their judicial capacities, of carrying on designs that were subversive of public liberty, and were sentenced to be hanged. See *Parl. Hist. of England*, vol. i.—*De Lolme on the Constitution of England*, p. 364.

In the reign of Charles the Second, Sir William Scroggs, lord chief justice of the Common Pleas, was impeached by the Commons, for partialities shewn by him in the administration of justice, and he was removed from his employment. *De Lolme on the Constitution*, p. 366.

† Charles the Second, on the passing of the Coventry A.C. Vide *Burnet's Hist.* vol. i.

One of the laws made by the Emperor Theodosius II. contains a maxim highly worthy of a monarch. "The sovereign majesty," says he, "does itself honour, by acknowledging its subjection to the law. The power of the laws is the foundation of ours, and there is more honour in obeying them, than in commanding alone without them."—"This," says Mr. le Beau, "is the sublimest lesson that a sovereign ever gave to his equals." *Milot's Ancient Hist.* vol. ii. p. 451.

## C H A P. VI.

*Of the Duties of a Naval and Military Judge Advocate or Deputy, as authorized by Act of Parliament, and the General Printed Instructions, Mutiny Act, and Military Articles of War; and confirmed by the Opinions of Counsel at different Periods.*

THE duties of a *naval* judge advocate are defined in so general a manner, in the act of parliament and printed instructions, that on different occasions it has been deemed expedient to have the opinions of counsel. The judge advocate may be said to be the *primum mobile* of a court martial, as not only impelling it to action, but as being the person on whom, in a great measure, depends that harmony of motion so necessary to constitute a regular court. Impowered by the printed instruction\* to advise the court of the proper forms when there shall be occasion, and to deliver his opinion in any doubts or difficulties which may arise in the course of the trial; the legislature, no doubt, intended that he or his deputy should be a person not only sufficiently versed in the legal forms of proceedings, but, from what has already appeared in these sheets, that he should likewise possess a competent knowledge of the forms of the

\* Vide Inft. under the head of Court Martial, art. 6.

other

other courts of judicature in the kingdom; more particularly of the forms of trials in criminal cases, by which courts martial ought to be in a great measure regulated, on those points where the acts of parliament and printed instructions are silent.

The act of parliament directs that, in the absence of the judge advocate, or his deputy, a court martial shall have power and authority to appoint any person to execute the office of judge advocate\*. And though it be usual and necessary for the president, some days previous to the trial, to appoint by warrant a person to officiate as judge advocate, in order that he may timely send to the party accused an attested copy of the articles of charge, and give intimation to the prisoner of the time and place appointed for his trial, furnish him with a list of the witnesses to be adduced against him, and require from him a list of those witnesses whom he wishes to adduce in his exculpation; also, to summon the witnesses, and all persons concerned, &c. yet the warrant ought to express the appointment to be by the court, according to the construction of the statute†; and a majority of the members, when the court is assembled, should concur in the appointment. Judge Bathurst is, however, of opi-

\* Act 22 Geo. II. c. 33. sect. 20. App. No. II.

† Vide form of naval judge advocate's warrant, Appendix, No. XXV. Form of summonses, No. XXIX.

nion, that it might not be improper to have this further explained by a new act \*.

By the printed instructions †, the judge advocate is to examine the witnesses upon oath, take down their depositions in writing, and shew the same to the commander in chief, who is to order him to send timely before the trial, an attested copy of the charge or accusation, to the party accused.

By the military articles of war (1804), under the head of *administration of justice*, section 16. art. 7. the judge advocate general, or some person deputed by him, is empowered to prosecute; and in all trials of offenders by general courts martial, he is to administer the oaths in the forms prescribed. The judge advocate general is appointed by warrant under the King's sign manual. The commander in chief on a foreign station, by virtue of the power and authority vested in him by his Majesty, appoints by warrant any eligible officer deputy judge advocate; and although it be very unusual, yet a junction has sometimes been adopted to make the warrant jointly to the president and deputy judge advocate ‡.

\* Vide case, and Judge Bathurst's opinion to Query 2. Appendix, No. XIV.

† Inst. under the head of Courts Martial, art. 5.

‡ See forms of military deputy judge advocate's warrants, App. No. LIX. sect. 1, 2. and No. LX.

All

All persons, subject to military law, are bound by their duty to attend and give their testimony at military courts martial, whenever summoned for that purpose; and, should it so happen that some of the witnesses should be persons in a civil capacity, and not bound to obey the citation of such a court martial, their attendance may be enforced by an application to the court of King's Bench, as will be hereafter noticed. But, it is to be regretted that there is no act of parliament, compelling persons in civil capacities to attend as witnesses at a naval court martial; whereby it becomes optional for them to attend or not.

By the mutiny act \*, it is provided, that all witnesses, duly summoned by the judge advocate, or by the person officiating as such, shall, during the necessary attendance at military courts martial, and returning from the same, be privileged from arrests, in like manner as witnesses attending any of his Majesty's courts of law are privileged†; and that, if any such witness shall be unduly arrested, he shall be discharged from such arrest by the court out of which the writ or process issued, by which such witness was arrested; or, if the court out of which the writ or process issued, be not fitting, then by any judge of the court of King's Bench in

\* Mutiny Act (1804), sect. 18.

† See form of judge advocate's summonses to witnesses, App. No. LXI.

London or in Dublin, according as the case shall require, upon its being made appear to such court or judge, by affidavit in a summary way, that such witness was arrested in going to or returning from, or attending upon such court martial: and that all witnesses so duly summoned as aforesaid, who shall not attend on such courts, shall be liable to be attached in the court of King's Bench in London or Dublin respectively, upon complaint made to the said court of King's Bench, in like manner as if such witness had neglected to attend on a trial in any criminal proceeding in that court. But witnesses unconnected with the army must, we conceive, be paid their travelling charges and for the loss of their time, or have the same tendered at least, before attachment will lie\*.

\* It is certainly worthy of observation that, though the legislature has thus anxiously provided for the attendance of civil witnesses, resident in England and Ireland; those in Scotland have been wholly overlooked. The granting a power to the courts of King's Bench in England and Ireland, to issue process of attachment, sufficiently establishes that, before the act passed, those courts possessed no such power; and that the court of Session in Scotland, by being omitted in the act, is still without it. The court of Session therefore cannot compel a witness to attend at a military court martial, while every one knows that the court of King's Bench has no authority in Scotland.

But it may be asked, Is a witness, resident in Ireland, compellable to give his attendance in England? The case is new, and, though we are unwilling to give a decided opinion, yet we are inclined to think he is not. The court of King's Bench in Ireland may convey a witness to the limits of that part of the united kingdom, but we do not apprehend that he could be forced to embark.

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In the *Army*, it is the practice to allow the necessary travelling charges to all subaltern officers, who may be obliged to attend as witnesses at courts martial; but it is not the usage in the navy to make any such allowance, although we see no just reason for the distinction. It is the practice, in all courts of justice, to defray the expences of all witnesses, whose attendance may be required in trials.

We find, by the standing regulations established for the army in India, a judicious practice has been adopted since October 1775, founded on the usage of our courts of law in similar cases, namely, that the charges of all persons who may be summoned to give evidence in courts martial, at the requisition of a prisoner, shall be paid by him, more especially in cases wherein it shall plainly appear that the evidence has been wantonly and unnecessarily called upon \*.

On important trials at *naval* courts martial, it is customary for the judge advocate to take preparatory

\* The following is an extract of the Standing Regulations established in India.

“ Bengal, 19th October 1775.

“ It appearing to the Board that persons have often been summoned to give evidence on courts martial, at the requisitions of the prisoners, whose evidence has not been material to the defence, and whose absence from their stations have been detrimental to the service; and it being the practice in all courts of justice, that the persons, at whose requisitions witnesses were summoned, should defray the expences of their attendance:

“ It



paratory affidavits, from the witnesses in support of the charge against a person to be tried; which affidavits he is to communicate to the commander in chief, and to the president of the court martial, but not to the several other members who may be summoned, until they are properly laid, in a judicial manner, before the court martial \*.

Neither is it proper that copies of the affidavits, in support of a charge against a person to be tried at a court martial, should be delivered or shewn to the person accused, previous to his trial †.

Though a judge advocate may be considered in the light of a prosecutor for the crown, it does not from thence follow that he is to deny every reasonable assistance to the prisoner in his defence, either in point of law or of justice. It is his duty, that the proof, both on the part of the crown and the prisoner, should be properly laid before the court. And, where any doubtful point may arise,

“ It is resolved that it made a standing rule, that the charge of all persons who may in future be summoned, at the requisition of the prisoners, be paid by them. The Board reserving to themselves the power of indemnifying such persons from the burden of this expence, (which they mean to do,) except in cases where in it shall plainly appear to them, that the evidence has been wantonly and unnecessarily called upon.”

\* Opinion of the Advocate General, &c. Query 3. App. No. XV.

† Vide opinion of Advocate General, and Solicitor of Admiralty, to Query 7, App. No. XV.

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he should incline on the part of the prisoner \* ; and nothing should induce him to omit any circumstances, in the minutes of proceedings, that might have a tendency to palliate the charges exhibited against the party accused—Were he to omit the insertion of any such circumstances, of his own accord, with a view to save himself trouble, his conduct would be highly criminal.

In the deliberations and debates of a court martial, the Judge Advocate may offer his sentiments and opinion, if required ; or, if he observe any error in point of law, or doubts arise, he ought to offer his judgment on the point, for the information of the court ; and he should communicate every matter or thing, which may conduce to a legal decision of the points in question †.

When a *naval* court martial is assembled for trial, the Judge Advocate, by direction of the President, reads with an audible voice, standing up, the order for assembling the court, and likewise the order or warrant of his own appointment. It then becomes his duty to administer to the respective members the oath prescribed by act of parliament ‡ ; and which is usually done by the President, and each member holding his right hand on the Evangelists, and, ac-

\* Vide Judge Bathurst's opinion, App. No. XIV. Query 1.

† Vide Opinion of Advocate General, &c. to Query 1. Appendix, No. XV.

‡ Stat. 22 Geo. II. cap. xxxiii. section 16, Appendix, No. II.

ording to seniority, repeating his name, and the following words of the oath audibly, after the Judge Advocate, viz.

*I, A. B. do swear, that I will duly administer justice, according to the articles and orders established by an act passed in the twenty-second year of the reign of his Majesty king George II. for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea, without partiality, favour, or affection; and if any case shall arise which is not particularly mentioned in the said articles and orders, I will duly administer justice according to my conscience, the best of my understanding, and the custom of the navy in like cases: and I do further swear that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court martial, unless thereunto required by act of parliament.*

So help me GOD.

As soon as the said oath shall have been administered, the President of the court is authorized by the said statute to administer to the Judge Advocate, or the person officiating as such, an oath in the following words:

*I, A. B. do swear that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court martial, unless thereunto required by act of parliament.*

So help me GOD.

VOL. I.

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It is likewise the Judge Advocate's duty to administer the oath to the witnesses produced at any trial by court martial \*, and to record the evidence in writing, nearly in the words of the witnesses, and to take minutes of all the proceedings of the court, which are to be read to the members, and approved by them. Should the trial last longer than one day, it is his duty, at the close of each day, to prepare a fair copy of the proceedings so far as they go, and he continues so to do until the conclusion of the trial, when the whole should be distinctly read over by him to the court, before the members proceed to deliberate on the sentence to be pronounced.

In the *Army* it is usual, at general courts martial, for the Judge Advocate to administer the oath as directed by the mutiny act and military articles, first to the President alone, and afterwards to the other members of the court. This mode should also be always attended to at *naval* courts martial, as tending to give more solemnity to the proceedings than swearing the President and the whole members together.

By the mutiny act and military articles † it is enacted, that in all trials by general courts mar-

\* See Forms of Oaths administered to witnesses at naval and military courts martial, Book II. cap. 2.

† Mutiny Act (1804), section 18, and Military Articles sect. 16. Art. 7.

trial, every member assisting at such trial, before any proceedings be had thereupon, shall take the following oaths upon the holy evangelists, before the Judge Advocate or his deputy, (who are authorized to administer the same,) that is to say :

*You shall well and truly try and determine, according to your evidence, in the matter now before you.*

So help you GOD.

*I, A. B. do swear, that I will duly administer justice, according to the rules and articles for the better government of his Majesty's forces, and according to an act of parliament now in force for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise, which is not explained by the said articles or act of parliament, according to my conscience, the best of my understanding, and the custom of war in the like cases: And I further swear, that I will not divulge the sentence of the court, until it shall be approved by his Majesty, or by some person duly authorized by him; neither will I upon any account at any time whatsoever disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof, as a witness by a court of justice in a due course of law.*

So help me GOD.

So soon as the said oaths shall have been administered to the respective members, the President

dent of the court is authorized to administer to the Judge Advocate, or to the person officiating as such, an oath in the following words :

*I, A. B. do swear, that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice, in a due course of law.*  
So help me GOD.

In comparing the analogy or variance between the oaths prescribed to the members of naval courts martial, and those above recited, directed to be administered at military courts, we will perceive, 1st, That the preliminary oath of the latter has been refused at naval courts martial since the passing of the act 22 Geo. II. c. 23. 2d, That the oaths, to be administered to the President, and members of a general court martial, contain a two-fold obligation of secrecy, viz. not to divulge the sentence of the court until it shall be approved by his Majesty, or some person duly authorized by him ; and not to disclose or discover the vote or opinion of any particular member, *unless required to give evidence thereof as a witness by a court of justice, in a due course of law* : whereas the oath administered to members of naval courts martial contains only the last obligation of secrecy, “not to discover the vote or opinion of any particular

ticular member, *unless thereunto required by act of parliament.*" 3d, The oaths of secrecy prescribed to be administered to the judge advocates, or persons officiating as such, are in tenor the same at naval and military courts martial, with this difference only, that, in the former, the disclosure of the vote or opinion of any member is not to be made *unless thereunto required by act of parliament*; and, in the latter, the disclosure not to be made *unless required to give evidence thereof as a witness by a court of justice in a due course of law.*

In the year 1749, the oath to be taken by the members of a naval court martial, that none of them should discover the vote of any particular member, *unless thereunto required by lawful authority*, was first introduced into the bill brought before the House of Commons. In the committee, a motion was made to leave out the words *lawful authority*, in order to insert these words, *the courts of justice in such cases where they have now by law a right to interfere, or by either house of parliament.* As to leaving out the words *lawful authority* no objection was made, but it being proposed to insert in their room, the words *act of parliament*, it occasioned a long debate, in which the general necessity and scope of the bill were thoroughly canvassed. At length the question was

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put, for inserting the words *act of parliament*, which was carried by 111 against 67.

As we have given, in the appendix \*, the substance of the arguments upon the general necessity and scope of the bill, it is only necessary in this place, to touch upon those urged against the form of the amended oath introduced.

The law first made in the beginning of king William's reign, which appointed an oath to be taken by the Judges in every court martial, in a form different to the present, was doubted to answer any good end; because a man, who is so wicked as to resolve to act unjustly, will shew no regard to that, or any other oath, that can be framed by the legislature. Members are not only to swear that they will duly administer justice, as was prescribed by the law of king William, which was the law passed on purpose for the trial of the Lord Torrington, (of which we have given an account in a preceding part of this work †,) but they are to swear not to discover any thing, that passes in debate relating to the trial; nay, even the Judge Advocate is to swear to the same secrecy. How ridiculous is this! How contrary to the whole tenor of our constitution! An oath of secrecy is an oath taken by no court of justice in the world,

\* See Appendix, No. LIV.

† Vol. I. chap. iv. p. 103, and Appendix, No. III.

except



except the court of inquisition ; and, as that court is in its own nature a court of injustice, cruelty, and oppression, we hope it will never be made a precedent for any new regulation here. In this happy country, the proceedings of all courts of justice are open and publickly known : no judge is afraid or ashamed of the opinion he gives, or of the reasons on which he founds that opinion. Even in the most solemn trials in parliament, the proceedings are open to the whole world, and votes are given in the most public manner. This is the great security for the impartiality and honesty of all our courts of justice : were it in their power to conceal from the world what they do, or the opinions they give, bribery and corruption would soon be as frequent, and have as powerful effect, as it has at any election in the kingdom ; for it has always been and always will be the prayer of rogues, *Noctem peccatis, et fraudibus objice nubem.* And this prayer will be effectually answered by this oath of secrecy, especially in our courts martial, which must never consist of a number less than five ; because, let the proceedings or sentence be ever so infamous, no particular member can be charged with it by the people, as every one of them will at least insinuate that he voted against it.

It was contended that the oath was before ridiculous, but now that it is quite absurd. By the law

passed the sessions before, they were not to disclose the vote of any particular member of the court, unless thereunto required by lawful authority; but by the oath prescribed, by the bill now before the House, they are not to disclose the vote of any member unless thereunto required by act of parliament. This puts it out of the power of either house of parliament, to enquire into the conduct of any member of a court martial, unless the crown pleases to consent to an act for that purpose. Suppose a brave Admiral should be condemned and shot by the sentence of a court martial, packed for the purpose by a revengeful favourite minister. If this bill pass, even the parliament itself could not enquire into the proceedings of that court martial, or punish any one upon that account, while that minister continued to engross the ear of his master. It was also said, we may all remember a late instance, where a brave Admiral gloriously disobeyed his orders, went a little further than his instructions, and thereby acquired great honour to himself and great advantage to his country. If such a bill as this had been then passed into a law, that Admiral would have been in some danger of being tried and condemned by a court martial.

This oath is one of the most absurd that ever was invented; because it may prevent an innocent man from being able to justify himself, against a prosecution at common law. We know that the  
members

members of a court martial may, by their proceedings, expose themselves to an action or prosecution at common law. A late court martial in the West Indies actually did so; and, in an action brought against one of them here at home, he was cast in a large sum of money, for what he did there as a member of a court martial; and at a later and more famous court martial the members, who certainly understood nothing of the common law whatever they did of the naval, brought themselves into such a scrape as would have ruined them, if the learned Judge they offended had not been so much of a Christian as to remember that prayer, *Good Lord forgive them, for they know not what they do* \*. In all such cases, surely, any member of the court martial might justify himself by proving that he opposed and voted against the illegal proceeding, upon which the action or prosecution is founded: but, if this bill should pass into a law, it will be impossible for him to bring such a proof.

It was further urged that this oath makes the increase of the number, of which a court martial may consist, still more dangerous; for, if any job is to be done, the infamy must rest upon all the members present, and though every one of them may, and probably will privately insinuate that he

\* This alludes to Lieut. Frye's case, mentioned in the preceding part of this chapter, p. 231.

voted

voted against it, yet no one of them dare openly assert, much less *prove*, that he voted against it, which will of course render every one of them less concerned about the infamy they expose themselves to: for the burden of infamy is like all other burdens, the more shoulders there are to support it, the lighter it sits upon every one; and, in a little time, we may have such a number of court martial jobbers, that they will keep one another in countenance, which will make it easier for a minister to get them to do whatever he pleases.

When the *mutiny* bill was brought into Parliament in 1749, a debate also took place respecting the words, "unless thereto required by act of Parliament," at the end of the oath of secrecy; for, instead of these words, it was moved to insert, "unless required to give evidence thereof, as a witness by a court of justice, in a due course of law;" and it was carried without a division, in favour of the alteration proposed: and this alteration in the oath has been ever since continued.

After the bill had gone through the committee, and the Speaker resumed the chair, it was moved to add in the amendment to the oath of secrecy, the words "by either House of Parliament;" upon which a warm debate ensued. The substance of the arguments, urged by the supporters of this last amendment, was as follows: That it was improper  
to

to give a greater power to the courts below, than is given to or reserved for the High Court of Parliament. By the oath, as it now stands, any member of a court martial may be obliged, by any of the courts in Westminster-hall, to disclose or discover the vote or opinion of every particular member of the court martial, when it becomes necessary to have a proof thereof in any trial before them. But, if a question should arise in either House of Parliament, relating to the proceedings or the sentence of a court martial, no member thereof could be desired, much less required, to disclose or discover the vote or opinion of any particular member of that court martial; for surely, no gentleman could be desired to make such a discovery, when he is bound by his oath not to do so. The whole of the oath was objected to, as an innovation lately brought into our military law, and as inconsistent with the whole tenor of our laws, and the very spirit of our constitution. With us, the courts of justice have always been open, and the judges thereof have delivered their opinions, and passed sentence of judgment in the face of the world. This will always have a good effect in favour of justice; for let men be ever so corrupt, let them be ever so abandoned, they will always have some regard for their safety, if not for their reputation; and will be cautious of letting the people know, that they have been the tools of oppression, and the dispensers of manifest injustice. But if we once  
begin

begin to have sentence passed in ſecret, under an oath of ſecreſy, we ſhall ſoon begin to have the whole trial carried on in the ſame manner; and this ſmells ſo ſtrong of the court of inquisition, and of thoſe terrible reſeclute courts, which are in arbitrary governments the inſtruments of tyranny, that it muſt give juſt alarm to every gentleman who has a regard for our conſtitution, or the happineſs of poſterity. We know how little an oath is regarded by mankind, when it happens to be inconſiſtent with their intereſt, and when they may break it, not only with impunity but advantage. No officer will therefore, notwithstanding this oath, ſuppoſe that his way of voting at a court martial can be hid from the crown, or the general, or the miniſter for the time being; conſequently the members of a court martial will ſtill continue to be under the ſame influence they are now. Before this oath was introduced, a member's way of voting at a court martial was publicly known, and if any one voted againſt what was ſuppoſed to be the inclination of the miniſter or general, and was afterwards diſmiſſed the ſervice, or diſappointed in his preferment, the world of courſe ſuppoſed, that it was on account of his having voted according to conſcience; which was an imputation, that a wiſe miniſter or general would chooſe to avoid: but no miniſter or general can now be in danger of any ſuch imputation, and therefore they will, with the more freedom, diſmiſs or diſappoint any officer who  
dares

dares to vote at a court martial contrary to their direction. The argument, that the oath of secrecy proposed will prevent officers being exposed to the resentment of one another, for their way of voting at a court martial, is frivolous, and carries with it an imputation both upon the officers of our army and upon our laws. Can we suppose, that any officer of our army would be afraid of doing justice, lest he should thereby incur the resentment of another officer? Can we suppose, that our laws would permit any officer to shew the least sign of such a resentment with impunity? This is therefore forming to ourselves an imaginary evil, and making use of that as an argument for introducing a real evil, and an evil which will be a precedent for introducing the worst of all evils, which is that of a secret and arbitrary tribunal. And, having once established such secret military tribunals, it will be a precedent for establishing such secret tribunals in all trials at common law. May it not be said, that our common law judges will be the less liable to influence the more secret their proceedings are kept? Do not we know, that our common law judges are liable to resentment, and that some have actually suffered for the decrees they have made, or the judgments they have pronounced? But such arguments, it was hoped, would never prevail with us, to establish an inquisitorial method of proceeding, in any of our courts of common law.

The principal arguments urged against the amendment were :—As to the danger suggested that this  
oath

oath of secrecy may be made a precedent for introducing the same sort of regulation, with regard to our courts of common law, it must be thought altogether chimerical; for the nature of the military law is so very different from that of the common law, that no regulation in the former can ever be made a precedent for any regulation in the latter: and, as this is the only danger suggested, no bad consequence is to be apprehended, from establishing this oath of secrecy, with respect to the vote or opinion of the several members of a court martial: nor is this without precedent, even in the proceedings of both Houses of Parliament, for the members of both are bound not to disclose what passes in the House; and though, when counsel is heard upon any case, or any point in dispute, the doors are in a manner thrown open, yet every one knows that in both Houses the doors are shut, and regularly every stranger excluded, when the members come to argue or determine the case or point among themselves. It was agreed that the Judges of every court ought to be made as independent as possible. With regard to our common law Judges, we have, since the revolution, effected this as much as the nature of things will admit. But with regard to the Judges upon a court martial, it is impossible, it would be absolutely inconsistent with the very nature of military service, to render them independent of the commander in chief; therefore we have reason to apprehend that the vote or opinion of gentlemen in a court martial may be directed by



the influence of the commander in chief, when he resolves to make use of his influence for that purpose. How is this to be prevented? No way that can be thought of, but by preventing its being known how every particular member voted; and it is to be wished that a more effectual method could be suggested than that of an oath of secrecy.

The suggestion, that mankind in general are regardless of an oath, is too true in all trials at common law, and all disputes about private property: but it is not so with the officers of the army. They must have a little more regard to their character for honour as well as courage, than is necessary in common life; and, when the character of an informer is tacked to perjury, they must have a very great regard to the oath they have taken. This will be the case, with regard to the oath now under consideration; if any officer should, notwithstanding his oath, disclose to the commander in chief the vote or opinion of any other officer upon a court martial, he would be looked on not only as a perjured wretch, but also as an informer; no gentleman would then keep him company; he must necessarily be driven out of the army. Therefore it is evident that officers not only may, but will, depend upon their vote or opinion being kept secret from the commander in chief, as well as every one else; and consequently will be, no more under his influence with regard to any vote or opinion they may give in a court martial,

martial, than they were before this regulation was introduced.

The case of officers giving their opinion in a court martial, and that of a Judge delivering his opinion from the bench, is widely different. The latter may never, probably, converse or be in company with any man he has offended by that opinion; he seldom appears but in a court of justice, or amongst his intimate friends, and consequently cannot be much exposed to the resentment of the man he has offended: but an officer may happen the very next day to be in company, perhaps sent upon the same service with the man against whom he voted at a court martial; and, though such man may not seem to shew any resentment against him on that account, he may pick a quarrel with him upon some other account, and put an end to his life in a duel, without its being possible even for a court martial to determine that the duel proceeded from a secret resentment of what the deceased had done at a court martial.

With regard to the proposed amendment it was contended as quite unnecessary, because it is comprehended in the amendment made by the committee. Is not Parliament a court of justice? Surely it is the highest court in the kingdom; and it is hoped will always be a court of justice. Suppose then it should be thought necessary to enquire into the conduct of a court martial, and  
Parliament

Parliament should be of opinion that the members had been guilty of some high misdemeanor, for which they ought to be punished, the method of proceeding must be by impeachment before the other House, and, in that case, is not the other House to be deemed a court of justice? Can we then think that any officer would be bound, by this oath as it now stands, not to discover the vote or opinion of any member of that court martial? The case is so clear, that it cannot admit of a doubt.

An obvious defect, in the oath administered to the Judge Advocate, at military courts martial, will present itself to our naval readers; on considering that he is not sworn to secrecy, as the members are with respect to the sentence of the Court, for a limited time. If policy and expediency required that members should not divulge the sentence of a general court martial, until it had received his Majesty's approbation, or that of a Commander in Chief, having a power delegated to assemble courts martial, the same reasons of policy and expediency, ought surely to apply with equal force to a Judge Advocate; otherwise the intention of the legislature, in guarding against the sentence being divulged, becomes nugatory and of no avail whatsoever, so long as it is left in the power, or at the discretion of any person officiating as Judge Advocate to divulge the sen-

tence of a general court martial, before the approbation of his Majesty or of the Commander in Chief be publicly announced.

It perhaps may be reasonably urged, that at times, it may be necessary for the power, in whose breast the confirmation of the sentence of a general court martial rests, to be informed, through the medium of the Judges or law officers, of certain circumstances with respect to points of evidence or legality of proceedings, the disclosure of which might probably tend to an alteration, suspension, or revival of the sentence; and that the Judge Advocate, from the simple obligation of his oath, is the only and proper person to resort to, for the necessary information. Admitting the necessity of the case, yet it is humbly conceived that the Judge Advocate should be sworn in like manner as the members, with respect to not divulging the sentence of the Court, until approved of by his Majesty, or some person duly authorized by him; and, by adding these words, *unless required so to do by his Majesty, or by some person duly authorized*, or words of a similar import, the oath would be so qualified as to answer most effectually the ends of justice and secrecy.

An essential alteration has been introduced into the Mutiny bill of 1805, which we think proper to notice in a particular manner.

On

On the third reading of the Bill in the House of Commons, 12th March 1805, the Secretary at War brought up a clause on the suggestion of General Fitzpatrick, by way of rider, to this effect,—that on all courts martial, other than general courts martial, every member composing such Courts should take an oath that he would well and truly try and determine the matter submitted to such Court, and administer justice according to the articles of war and the act for punishment of mutiny and desertion, without partiality or affection.

General Fitzpatrick explained his reasons for having suggested this clause to the Secretary at War. Had he supposed such a clause could have had the effect of weakening or relaxing the discipline of the army, he should not have brought it forward. It was with a view to strengthen the powers of the Mutiny bill that he proposed the measure. He contended, that it would add more to the solemnity and gravity of regimental courts martial if they were assimilated to general courts martial by the administration of oaths to the members composing them, as well as to the witnesses. He observed, that regimental courts martial had been originally instituted for the trial and punishment of minor offences, and had been extended by degrees to the consideration of higher military crimes, in consequence of a sort of fiction: thus desertion had been deemed absence from duty, and mutiny un-

foldier-like behaviour. If crimes of this heavy description were brought before a Court that strictly had not cognizance of them, at least the usual solemnities ought to be observed.

The clause was agreed to and added to the bill, which then was passed, and ordered to the Lords.

On Friday the 15th March 1805, the House of Lords having gone into a committee on the said mutiny bill, the Marquis of Buckingham objected to the clause which enacts that the members of a regimental court martial shall be sworn, and that all proceedings before them shall be upon oath. He thought it unnecessary, as regimental courts martial, as at present constituted, were more inclined to lenity than severity; and the proof that their proceedings were universally satisfactory was, that there scarcely ever occurred an instance of a foldier ever availing himself of his privilege to appeal to a general court martial.

Lord Camden wished it to be understood, that the clause was not brought forward with an idea of correcting any supposed abuse in regimental courts martial; its sole object was to attach greater solemnity to their proceedings.

The Duke of Cumberland disapproved of the clause on two grounds; the first, that it was an innovation,

innovation, which would found as if the proceedings of regimental courts martial were at present not so correct as they ought to be: The second, that by putting the members under the obligation of an oath, their judgments must in many cases be more severe on the soldier than at present.

The Duke of Clarence gave his assent to the arguments urged against the clause; and Lord Hawkesbury and Lord Mulgrave urged arguments in support of the clause, which was carried by a majority of twenty-six to thirteen. The remaining clauses were gone through, and the Bill was ordered to be reported.

The amendments, therefore, introduced into the Mutiny Act of 1805 were as follow: a new clause between clause 18 and 19 of Mutiny Act 1804, to the following effect: Provided also, and be it further enacted, That in all trials by any courts martial, (other than general courts martial,) which shall be held by virtue of this act, or of any articles of war established by his Majesty in pursuance thereof, every member assisting at such trial before any proceedings be had thereupon, shall take the following oaths upon the Holy Evangelists, (which oaths shall and may be administered by the president of the court to the other members thereof, and to the president, by any member (having first taken the said oaths); that is to say,

*You shall well and truly try and determine, according to your evidence, the matter now before you,*

So help you GOD.

*I A. B. do swear, That I will duly administer justice according to the rules and articles, for the better government of his Majesty's forces, and according to an act of Parliament now in force, for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise which is not expressed by the said articles, or act of parliament, according to my conscience, the best of my understanding, and the custom of war in the like cases.*

So help me GOD.

And the president of every such court martial (not being under the rank of a captain) shall be appointed by the commanding officer of the regiment, detachment, or brigade, or the governor or commander of the garrison, fort, castle, or barracks directing such court martial.

There is also introduced a new clause instead of clause 39, respecting the quartering and billeting his Majesty's horse or dragoons, also bat and baggage horses belonging to any of his Majesty's other forces, and also the horses belonging to staff and field officers in his Majesty's forces when upon actual service: also, another clause instead of



clause 55, former mutiny act, enacting, that all his Majesty's officers and soldiers, and their horses on duty, or on the march, and all carriages and horses belonging to his Majesty, or employed in his service, and returning therefrom; and also all boats, barges, and other vessels belonging to his Majesty, or employed in his service, when conveying the officers, soldiers, servants, women, children, or other persons belonging to his Majesty's forces, and also the arms, cloaths, accoutrements, tents, baggage, and other equipage of or belonging to his Majesty's forces on their marches, or returning therefrom, shall be liable, equally with others, to the duties and tolls formerly exemptable by several acts of parliament,

There is an additional article of war to the following effect: That all persons who give evidence in a general or *other court martial*, are to be examined on oath. \*

Hence we perceive that the members of regimental, detachment, and other courts martial, are to be sworn to administer justice in the same manner as members of general courts martial; but the form of the oath varies in this respect, that the members are not sworn to secrecy.

The test of experience may justify the Duke of Cumberland's observations relative to the necessity

\* See Mutiny Act, and Additional Articles of War, 1805.

or expediency of putting the members of a regimental court martial under the obligation of an oath, as it may tend to make the sentences more severe than formerly.

An opinion, at the present untried moment of this new regulation, may perhaps with propriety be hazarded, namely, that instead of putting the members of a regimental court martial under the solemn obligation of an oath, whether it might not have answered equally well the ends of justice and discipline in the army, to have restricted the punishment to be inflicted by any regimental court martial to two hundred lashes, which would have comprehended the proportionate punishments for all minor offences cognizable by such regimental courts martial in virtue of the mutiny act and articles of war, as they formerly stood.

In this place it may not be improper to observe, that the members of a naval court martial are but once sworn at the first assembling, though they may continue to sit for several days, on the trial of different offenders\*.

Prior to the statute 22 Geo. II. it was customary for the Judge Advocate to administer to the mem-

\* The same takes place at general courts martial in the army; and, in courts of law, the judges have the oaths administered to them but once, which is when they first receive their appointment; but the jurors are sworn on every different trial.

bers

bers an oath, of the same tenor as the preliminary one, already noticed, and used at this day in the army, viz..

*“ Well and truly to try and determine the matter before them, between the king and the prisoner to be tried.”* The tenor of this oath occasioned doubts,

in the minds of some of the members of the court martial, assembled for the trials of Capt. Burrish and other officers, whether the court could legally defer passing sentence upon Capt. Burrish, until they had gone through the whole evidence relating to all the other captains, accused of similar offences, in relation to the engagement off Toulon; but, from the opinion of the crown lawyers, it appears to have been then agreeable to practice \* (and ought to be invariably pursued) for the court to determine on the sentence to be given upon each trial for capital offences, before they proceed to any other trial for offences of the like nature. And the court cannot, by law, admit the evidence given at any preceding trial to have any weight, in forming their judgment, and giving sentence, upon the trial of the person then before them †.

### Challenges

\* Vide Opinion, Appendix, No. XVI. sect. 2.

† When a court martial is assembled for the trial of officers, on specific articles of charges, on a general accusation, it is usual to give separate sentences, as was done in the trials of the officers accused of not having done their duty in the engagement off Toulon.—See particulars relating to the articles of Charges and Sentences, in Appendix, No. XVII.

Challenges, or exceptions made by the party accused to the members of a court martial, are very unusual in the navy, and we have few instances of challenges on record, since the amendment of the act regulating courts martial. Prior to that period, and when a greater number of captains sat at courts martial than as at present established, we have several instances of objections being made to particular members. Admiral Matthews, on his trial before alluded to, objected to Captains Legge, Rentone, and Hamilton being admitted to sit as judges or members of the court, and stated, *instantly*, the reasons upon which his challenge was founded; namely, because the ships the said captains commanded were at a distance out of the district or limits of the command of the officer who was appointed to preside at the court martial, and were not in the actual commands of the ships to which they belonged, other officers having been appointed to act in their room: and, though the members of the court had in effect over-ruled these exceptions, by proceeding to read the charge, yet, dissident of their acting with propriety, they wrote to the Admiralty, and requested their Lordships' determination upon the

But when any general charge of mutiny is exhibited against officers or seamen, it is the practice sometimes to try them all together, at other times to try them separately: but, in either case, it is usual to enter the judgment of the court upon the minutes, and make one sentence serve for all; specifying the respective punishments to be inflicted, and the respective acquittals.—Vide Sentence, App. No. XXXIV. sect. 3.

validity

validity of the objections. And it appears, from the Secretary of the Admiralty's letter, that the Admiral's objections were ill-founded \*. The three captains sat accordingly as members of his court martial, and after a trial which commenced on the 16th June 1746, and by several adjournments continued until the 22d day of October, the Court "did unanimously think fit to adjudge the said "Thomas Mathews to be cashiered and rendered "incapable of any employ in his Majesty's service." Although neither the articles of war, nor the statutes, make the least mention of any privilege of challenges being allowed a prisoner at courts martial, yet it ought not from thence to be inferred, that he is to be totally restricted from assigning just cause, why a particular member should not sit upon his trial; at the same time it is obvious, that it would be highly detrimental to the service to allow challenges to be made to members of a court martial, in the same way as is done to jurors in common law †. By the laws of England, in the time of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged ‡; for the

\* See letter from Mr. Corbett on the subject. Appendix, No. XVIII.

† Jurors may be challenged by either party before they shall be sworn, and are distinguished into various forms of challenges. Black. Com. vol. iii. p. 361.

‡ Coke upon Littl. 294.

law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice. And, should the fact at any time prove flagrantly otherwise, the delicacy of the law will not anticipate it; yet it is not to be doubted, that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct\*.

But, upon the principles that members of a court martial are both judges of the law and of the fact, and as such are to be considered in the double and compound capacity of judges and jurors, and as amenable to the laws of their country for any flagrant partiality or illegality in their proceedings, they ought to be extremely delicate and cautious of rejecting any challenges, or objections made by a prisoner, previous to the court's being sworn, without first admitting him to shew cause; because, upon a consideration of the reasons assigned for such challenge, if they be not sufficiently valid, a majority in opinion may always over-rule the challenge, and afterwards proceed on the trial.

Although it be the daily practice in our criminal courts to allow a prisoner a right of *peremptory*

\* Black. Com. vol. iii p. 361. Edit. 1791, octavo.—The judges of the court and the jurors may be sworn as witnesses for any of the parties, for they can have no interest in the issue of the trial, and no bias of any kind to give evidence against the truth.—*Hawkins' P. C.* 432. *Bacon's Abr.* V. ii. p. 286.

challenge,

challenge, that is, objecting to jurymen (to a certain number) without assigning any cause; yet the constitution of naval or military courts martial cannot admit of the exercise of a similar privilege. If a prisoner, to be tried at a naval or military court martial, challenge any member of the court, he should immediately assign cause for such challenge; the court will judge of the validity, and in their discretion admit or reject it.

There are many causes for which a juror in a court of law may be challenged; but there are very few of a valid nature, upon which any member of a court martial may be successfully challenged by a prisoner. A most obvious cause of challenge, and which it would be the duty of a judge advocate to anticipate, may be made against any officer, sitting at a court martial, who had previously sat at a court of enquiry, and given his opinion on the matter at issue. The same rule is applicable in cases of appeal from a regimental to a general court martial. The validity of this objection is founded upon the same principles of reason, as the exceptions against a grand juror, who has found an indictment, and therefore cannot sit, as one of the petty jury, upon a trial of the same cause\*. But we have our doubts whether it would be a valid

\* Coke upon Littleton, 157.

objection at naval courts martial against any member who had sat at a previous court martial on the trial of either a prosecutor or prisoner, implicated in charges connected with each other, or of a recommitting nature.

We find on the trial of Admiral Mathews, that fourteen members, who had previously sat on the trial of Vice Admiral Lestock on charges of a similar nature, composed with five other members the tedious court martial held on Admiral Mathews. And on the trial of Admiral Sir Hugh Paliser (April 1779) two captains sat, who had been members of the court martial held on Admiral Keppel.

Though, in courts of law, it be admitted as a good challenge on the part of the prisoner, that the juror hath a claim to the forfeiture, which shall be caused by the party's conviction \*; yet it is doubtful, and we apprehend a similar objection would not be admitted as a just cause against any member of a court martial, who might be the next for rank or promotion, by the probability of the party accused forfeiting his commission, or being dismissed from his Majesty's service.

Although by Statute law, infants or persons under the age of twenty-one years may be challen-

\* State Trials, vol. i. fol. 502.



ged as jurors \*, yet at naval courts martial a challenge of a similar nature against any member of Court, would be overruled; because, by the established rules and regulations of the navy, no midshipman is qualified to receive a commission as lieutenant, until he has produced, at his examination for passing, proper testimonials of his being twenty-one years of age. In the army, even challenges of this nature would be cautiously admitted, and they are usually guarded against, because the warrant, for holding general courts martial within any particular part of his Majesty's dominions, contains the names of the president and all the members of the Court; and in other cases, if directed to the president alone, the Commander in Chief issues orders for certain regiments to furnish each a quota of Officers of a rank therein specified.

Deeming it irrelevant to enter into all the refined distinctions laid down by law authorities, on the several causes or grounds of challenges which may be made to jurors in courts of law; it is to be trusted that what has been said and quoted, on the subject of challenges, will suffice, for the government and regulation of naval and military officers, who may be placed at courts martial in the conjunct capacities of judges and jurors, or in other words, as judges of the law and fact.

\* Stat. 7 and 8 Wil. and Mary, c. 32.

Though

Though the words of the twelfth section of the statute\* be "that no court martial shall consist of more than *thirteen*; or less than *five* persons, to be composed of such flag-officers, captains, or commanders, then and there present, *as are next in seniority* to the officer who presides†." It cannot admit of the construction, that the *next in seniority* to the president, who happens to be present, should attend in order, notwithstanding any impediment whatever. This would be found not only detrimental to his Majesty's service, by rendering it extremely difficult to make a court; but also contrary to the general tenor of the act, which appears to be calculated to expedite justice, as much as possible; by permitting five captains to constitute a court;

\* 22 Geo. II. cap. 33. sect. 12. App. No. II.

† In the army, it is enacted, by the 11th section of the mutiny act, that no general court martial shall consist of a *less number* than thirteen commission officers, except the same shall be holden in Africa or in New South Wales. The facility of having members to compose an army court martial, as well as to guard against the accident of any of them falling sick or dying after the trial has commenced, are the obvious and striking reasons of the legislature requiring that no general court martial should consist of a *less number* than thirteen members. It is therefore usual to have sixteen or seventeen members at general courts martial assembled in Great Britain and Ireland. Prior to the statute 22 Geo. II. cap. 33. naval courts martial, assembled within the jurisdiction of the Admiralty, were never composed of a less number than thirteen members, and which the reader will readily perceive, by a reference to the sentences on the Toulon officers in 1745 and 1746, where from eighteen to twenty-four sat as members. Vide App. No. XVII.

and

and by allowing even commanders to assist, when a sufficient number of post captains are not to be found \*.

And as there is an express power vested in the court, by the fifteenth section of the statute †, to dispense with the presence of any member, provided a just and sufficient cause be assigned before a trial is begun, the court may proceed to business if the remaining number of qualified officers be sufficient to constitute a court martial; and that the judge advocate has entered in the minutes, that the absent and senior officers have certified the president, by letter or otherwise, of their inability to attend through ill-health. And, even after trial is begun, the court may dispense with the presence of any member, and suffer him to go on shore (in case of illness), and continue the proceedings of the trial, at the several adjournments, while the qualified number remain to constitute a court ‡. But the addition of new members will not be proper, unless such persons should hear, or be well informed of the evidence given before their attendance §.

Notwithstanding the above reasonable construction of the statute, and the power vested in the

\* 22 Geo. II. cap. 33. sect. 14. Appendix, No. II.

† Ibid. sect. 15. with amendment. Appendix, No. II.

‡ See Dr. Harris's Opinion. Appendix, No. XIX.

§ See the Advocate and Solicitor General's Opinions. App. No. XV.

president and members of a court martial, to dispense with members on *just and sufficient cause*, we find that the members, of a court martial on Captain Bromedge, would not dispense with the attendance of Rear Admiral Edwards and Captain Balfour, two of its members, even upon a representation of the urgency of the King's service \*, and when eleven members would have still remained to carry on the proceedings, and pass sentence.

The Lords of the Admiralty approved of the application, to dispense with the above two members; but the court were of opinion they had no power to determine upon it. But, if the sufficiency of the cause be admitted, with all deference to the opinion of the respectable members who composed the court, it is conceived, that from the literal import of the section of the statute already quoted †, they were legally empowered to dispense with the two members, and to continue holding the court every day, by adjournments, until sentence was finally passed. And the literal construction has been given this section by the learned counsel, whose opinion is inserted in the subsequent part of this work ‡.

\* See Admiral Sir Thomas Pye's Letter, stating the case to the Admiralty. App. No. XX.

† Stat. 22 Geo. II. cap. 33. sect. 15. with amendment, Vide App. No. II.

‡ Vide Opinion. App. No. XIX.

By the statute 22 Geo. II. c. 33. § 7.\* No Commander in Chief of any fleet or squadron of his Majesty's ships, or detachment thereof, consisting of more than five ships, shall preside at any court martial *in foreign parts*, but that the officer next in command to such officer commanding in chief shall hold such court martial, and preside thereat; any law, custom, or usage to the contrary notwithstanding. And by sect. 9. it is enacted, that "if any five or more of his Majesty's ships or vessels of war shall happen to meet together *in foreign parts*, then, and in such case, it shall be lawful for the senior officer of the said ships or vessels to hold courts martial and preside thereat, from time to time; as there shall be occasion, during so long time as the said ships or vessels of war, or any five or more of them, shall continue together."

We have an instance of a court martial being deemed illegal because the Commander in Chief of a squadron presided thereat, contrary to the meaning and import of the 7th sect. of the statute above quoted. This occurred in the West Indies 13th September 1790, on the trials of John Cannon First Lieutenant of his Majesty's ship *Brune*, for neglect of duty, disobedience of orders, &c. and of Edward Power, gunner of the said ship, for taking a pair of pistols out of the ship with an intent to

\* App. No. II. Sect. 7.

sell them. The former was adjudged to be dismissed the service, but recommended to the Admiralty for half pay ; and the latter was sentenced to be dismissed the service, rendered incapable of serving his Majesty, his heirs and successors, and to serve before the mast in any ship the Commander in Chief might appoint \*.

With a view of illustrating this subject more fully, it may be deemed of some importance to naval officers to have the case of Lieutenant John Cannon, of his Majesty's ship Brune, and Edward Power, gunner of the said ship, particularly stated, together with the opinion given thereon by Mr. Cust, the counsel for the affairs of the Admiralty. Lieutenant Cannon and Edward Power were tried at Jamaica, 13th September 1790, for the offences already specified ; at which court martial Rear Admiral Affleck, Commander in Chief of his Majesty's ships and vessels employed in and about the Island of Jamaica, (*consisting of more than five,*) appears to have been president, and the Captain of his Majesty's ship Brune sat also as a member. Mr. Cust's opinion was requested, whether, by the provisions of the act of the 22d Geo. II. c. 33. the proceedings of the said Court were not null and void, in consequence of the Commander in Chief having presided thereat as above mentioned, and if

\* See Chronological List of Trials.

fo, whether the said Lieutenant and Gunner might not be regularly tried *de novo* for the offences with which they have been respectively charged? The case also stated, that when an offence is committed by a person belonging to a king's ship, which requires the decision of a court martial, the Captain or Commanding Officer of such ship is the person who, in a letter to the Commander in Chief, usually charges the offender with the specified crime; although such Captain, of his own knowledge, is not acquainted with a single circumstance, or able to give any evidence whatever on the subject of the accusation, and yet he has been considered as the prosecutor, and excused from sitting as a member of the Court. Copies of the two sentences were left with Mr. Cust, that he might give his opinion accordingly, after he had perused the act of the 22d Geo. II. c. 33. and particularly the 6, 7, 12, and 14, sections of the said act; his opinion was also desired, whether a Captain under the above circumstances was either disqualified, or might be excused, and by whom, from sitting as a member of a court martial, notwithstanding the 12th sect. of the said act, which directs that such Court shall be composed of such flag officers, captains, or commanders then and there present, as are next in seniority to the officer who presides thereat?

Mr. Cust, on the 12th January 1791, gave the following opinion: "By the express proviso of the

“ act, that no Commander in Chief of any fleet or  
“ squadron consisting of *more than five ships*, shall  
“ preside at any court martial *in foreign parts*, the  
“ Court was illegally held, and I think the pro-  
“ ceedings are totally void. In such a case, no  
“ directions are given for a trial *de novo*, and as the  
“ Lieutenant and Gunner are said to have been  
“ dismissed from his Majesty’s service, they cannot  
“ be legally punished twice for the same offence.  
“ This seems to be the sense of the Legislature in  
“ the 29th sect. of the act, and it is agreeable to a  
“ known maxim of law, that *nemo debet bis puniri*  
“ *pro uno eodemq. delicto*. But if no part of the  
“ sentence have been carried into execution, the  
“ trial *coram non iudice* is to be considered as no  
“ trial, and I think may be tried more regularly,  
“ 2d. As the question is general, and no fact is  
“ stated, to which it is particularly applicable, it  
“ must be governed by the general rule of law,  
“ that no man can be a judge in his own cause,  
“ which is such a rule of justice, that Lord Hobart  
“ asserts it to be more binding than even an act of  
“ parliament. It certainly is a most material objec-  
“ tion to a judge, that he is a prosecutor or ac-  
“ cuser; and as the 10th sect. of the act exempts  
“ the next in command from presiding where any  
“ *material objection occurs*, which may render it  
“ improper, I am inclined to think, that the rule of  
“ law may apply the exemption to the next in sen-  
“ iority, sitting as a member of a court martial,  
“ where



“ where a material objection occurs, notwithstanding  
“ the generality of the words in the 12th section. It  
“ is a misfortune that the act which was made for  
“ reducing into one act of parliament the laws re-  
“ lating to the government of the navy, should be  
“ imperfect and defective in directions concerning  
“ courts martial.”

This last branch of Mr. Cust's opinion, is a fact admitted by every person conversant in naval laws and discipline, and we have in many instances in the progress of this work, pointed out defects in the statute regulating naval courts martial. The variety of constructions of which many of the sections are susceptible, and the want of explicitness in the wording of others, have too often left the minds of the best informed in a state of doubt and conjecture. Hence the necessity (of which so many striking proofs are herein recorded) of the executive power and members of courts martial resorting to the opinions of counsel so frequently since the year 1749, when the laws relating to the government of the navy were consolidated into one act of parliament. We cannot therefore refrain from repeating a wish, at a period when so many gallant and meritorious naval officers are members of the British Legislature, that such imperfections as now appear in the said statute, and which their predecessors did not foresee or provide against, may be remedied, by an early legisla-

tive revision of the laws relating to the government of his Majesty's navy.

By *foreign parts*, mentioned in the 7th and 9th sections of the act 22d Geo. II. c. 33. or in any other section, is to be clearly understood his Majesty's dominions beyond the seas, including colonies or plantations, as well as the ports of foreign princes or states; and it would evidently be a false construction and perversion of the meaning of the 9th section, to suppose that it would be lawful for the senior officer of any five or more ships or vessels of war, happening to meet together *in foreign parts*, to hold courts martial and preside thereat, *in the ports of foreign princes or states only*, when a more extensive latitude is obviously given by the words of the Legislature, and which comprise also his Majesty's foreign possessions in every part of the world. Were not this the literal construction to be put on the words *in foreign parts*, the service would occasionally suffer the greatest inconvenience. Should five or more of his Majesty's ships and vessels happen to meet together at our settlements on the coast of Africa, or at our possessions, colonies, or plantations in the East or West Indies, where there might be no Commander in Chief, yet surely the senior officer of the said ships or vessels is empowered, by virtue of the said section, to hold courts-martial and preside thereat, in the same manner as if they happened to meet together

together in ports belonging to foreign princes or states. In the subsequent chapter, Vol. II. c. 1. we shall notice the form of an order issued by a senior officer for assembling a court martial in foreign parts, at which he is to preside.

The president is the proper person to put all the interrogatories to the witnesses; but, with his consent and approbation, it is usual for the judge advocate to put all interrogatories proposed by him, or the other members of the court, to the witnesses: and, should the president think proper to decline allowing the judge advocate to put a question, proposed by any of the junior members, it is the practice for the court to be cleared, and it is to be determined by a majority of votes, whether the question proposed should be stated or not \*. As the judge advocate is considered as a prosecutor in behalf of the crown, and by his having, previously to the trial, collected the evidence, he is supposed by law to be able to judge what questions are proper to be put to witnesses, and has therefore a right to ask them all proper and fit questions †.

Though the members of a naval court martial may not be unanimous, in their determinations upon the matters before them, yet as the sentence drawn

\* Vide Opinion of the King's Advocate General, &c. to Query 5, App. No. XV.

† Vide Opinion of the Crown Lawyers. App. No. XXII,

original minutes of the proceedings, as recorded by him during the course of any trial; and he should also keep in his possession distinct notes of the opinions and votes of the several members on deliberating upon the articles of accusation, and pronouncing judgment; in order that he may be fully prepared to answer any questions or discussions that may be afterwards moved in parliament, or in the ordinary courts of law relative to the trial, in the event of his being called upon to give evidence to that effect \*.

\* A deputy or officiating judge advocate in the navy is paid by certificate, at the rate of four pounds for each trial, in conformity to the standing regulation of the Admiralty, made in the year 1780. Although the trial may end in one day, it is usual to insert in the certificate *ten days, employed in summoning witnesses, attending the trial, and transmitting a copy of the minutes, &c.* Where trials have lasted longer, twelve days have been allowed at the rate of eight shillings per day. See form of certificate, *Appendix No. XLIV.*

A deputy judge advocate in the army is usually allowed a constant salary: and the officiating judge advocate has ten shillings per day for a given number of days, whether the trial last so long or not; but, if its duration exceed that number of days, he is paid at the rate mentioned until the trial be ended, besides an allowance for stationary.

# A P P E N D I X.

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## No. I. Articles of War.

ARTICLES contained in an act of parliament, 22 Geo. II. c. 33. intituled, An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea.

Likewise some clauses of the act 19 Geo. III. explaining and amending articles of the act passed in the twenty-second year of his late Majesty King George II.

*The following articles and orders were established from the 25th of December 1749; and are directed to be observed and put in execution, as well in time of peace as in time of war.*

ALL commanders, captains, and officers, in or belonging to any of his Majesty's ships or vessels of war shall cause the public worship of Almighty God, according to the Liturgy of the Church of England established by law, to be solemnly, orderly, and reverently performed in their respective ships; and shall take care that prayers and preaching, by the chaplain in holy orders of the respective ships, be performed diligently; and that the Lord's day be observed according to law.

Divine  
worship.

II. All flag officers, and all persons in or belonging to his Majesty's ships or vessels of war, being guilty of profane oaths, cartings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour,

Swearing,  
Drunken-  
ness, scan-  
dalous ac-  
tions, &c.

honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

Holding intelligence with an enemy, or rebel.

III. If any officer, mariner, soldier, or other person of the fleet, shall give, hold, or entertain intelligence to or with any enemy or rebel, without leave from the king's Majesty, or the lord high admiral, or the commissioners for executing the office of lord high admiral, commander in chief, or his commanding officer, every such person so offending, and being thereof convicted by the sentence of a court martial, shall be punished with death.

Letter or message from an enemy, or rebel.

IV. If any letter or message from any enemy or rebel be conveyed to any officer, mariner, or soldier, or other in the fleet, and the said officer, mariner, soldier, or other as aforesaid, shall not, within twelve hours, having opportunity so to do, acquaint his superior officer, or the officer commanding in chief with it; or if any superior officer, being acquainted therewith, shall not in convenient time reveal the same to the commander in chief of the squadron, every such person so offending, and being convicted thereof by the sentence of a court martial, shall be punished with death, or such other punishment as the nature and degree of the offence shall deserve, and the court martial shall impose.

Spies, and all persons in the nature of spies.

V. All spies, and all persons whatsoever who shall come or be found, in the nature of spies, to bring or deliver any seducing letters or messages, from any enemy or rebel, or endeavour to corrupt any captain, officer, mariner, or other in the fleet to betray his trust, being convicted of any such offence, by the sentence of the court martial, shall be punished with death, or such other punishment as the nature and degree of the offence shall deserve, and the court martial shall impose.

VI. No

VI. No person in the fleet shall relieve an enemy or rebel with money, victuals, powder, shot, arms, ammunition, or any other supplies whatsoever, directly or indirectly, upon pain of death, or such other punishment as the court martial shall think fit to impose, and as the nature and degree of the crime shall deserve.

Relieving  
an enemy  
or rebel.

VII. All the papers, charter-parties, bills of lading, passports, and other writings, whatsoever, that shall be taken, seized, or found aboard any ship or ships, which shall be surprized or taken as a prize, shall be duly preserved, and the very original shall, by the commanding officer of the ship which shall take such prize, be sent entirely and without fraud to the court of admiralty, or such other court or commissioners as shall be authorized to determine whether such prize be a lawful capture, there to be viewed, made use of, and proceeded upon according to law, upon pain that every person offending herein shall forfeit and lose his share of the capture, and shall suffer such further punishment as the nature and degree of his offence shall be found to deserve, and the court martial shall impose.

Papers, &c.  
found on  
board of  
prizes.

VIII. No person in or belonging to the fleet, shall take out of any prize, or ship seized as a prize, any money, plate, or goods, unless it shall be necessary for the better securing thereof, or for the necessary use and service of any of his Majesty's ships or vessels of war, before the same be adjudged lawful prize in some admiralty court; but the full and entire account of the whole, without embezzlement, shall be brought in, and judgment passed entirely upon the whole, without fraud; upon pain that every person offending herein shall forfeit and lose his share of the capture, and suffer such further punishment as shall be imposed by a court martial, or such court of admiralty, according to the nature and degree of the offence.

Taking  
money or  
goods out  
of prizes.

Stripping  
or ill treat-  
ing prison-  
ers.

IX. If any ship or vessel shall be taken as a prize, none of the officers, mariners, or other persons on board her, shall be stripped of their cloaths, or in any fort pillaged, beaten, or ill-treated, upon pain that the person or persons so offending, shall be liable to such punishments as a court martial shall think fit to inflict.

Preparation  
for fight.

X. Every flag officer, captain, and commander in the fleet, who upon signal or order of fight, or sight of any ship or ships which it may be his duty to engage, or who upon likelihood of engagement shall not make the necessary preparations for fight, and shall not in his own person, and according to his place encourage the inferior officers and men to fight courageously, shall suffer death, or such other punishment as from the nature and degree of the offence a court martial shall deem him to deserve; and if any person in the fleet shall treacherously or cowardly yield or cry for quarter, every person so offending, and being convicted thereof by sentence of a court martial, shall suffer death.

Yielding or  
crying for  
quarter.

Obedience  
to orders in  
battle.

XI. Every person in the fleet, who shall not duly observe the orders of the admiral, flag officer, commander of any squadron or division, or other his superior officer, for assailing, joining battle with, or making defence against any fleet, squadron, or ship; or shall not obey the orders of his superior officer as aforesaid, in time of action, to the best of his power, or shall not use all possible endeavours to put the same effectually into execution: every such person so offending, and being convicted thereof by the sentence of the court martial, shall suffer death, or such other punishment, as from the nature and degree of the offence a court martial shall deem him to deserve.

Withdraw-  
ing or keep-  
ing back  
from fight,  
&c.

XII. Every person in the fleet, who, through cowardice, negligence, or disaffection, shall in time of action withdraw or keep back, or not come into the fight or engagement,



ment, or shall not do his utmost to take or destroy every ship which it shall be his duty to engage; and to assist and relieve all and every of his Majesty's ships or those of his allies, which shall be his duty to assist and relieve; every such person so offending, and being convicted thereof by the sentence of a court martial, shall suffer death.\*.

XIII. Every person in the fleet who through cowardice, negligence, or disaffection, shall forbear to pursue the chase of any enemy, pirate, or rebel, beaten or flying; or shall not relieve and assist a known friend in view to the utmost of his power, being convicted of any such offence by the sentence of a court martial, shall suffer death.

Forbearing  
to pursue an  
enemy, &c.

XIV. If when action, or any service shall be commanded, any person in the fleet shall presume to delay or discourage the said action or service, upon pretence of arrears of wages, or upon any pretence whatsoever; every person so offending being convicted thereof by the sentence of the court martial, shall suffer death, or such other punishment, as from the nature and degree of the offence a court martial shall deem him to deserve.

Delaying or  
discourag-  
ing any ser-  
vice.

XV. Every person in or belonging to the fleet who shall desert to the enemy, pirate, or rebel; or run away with any of his Majesty's ships or vessels of war, or any ordnance, ammunition, stores, or provision, belonging

Deserting to  
an enemy;  
running a-  
way with  
ships stores.

\* By act of parliament, 19. Geo. III. c. 17. sect. 3. this article and the subsequent are explained and amended thus: "And whereas, the restraining of the power of the court martial to the inflicting of the punishment of death, in the several cases recited in the said clauses, may be attended with great hardships and inconvenience; be it enacted, that from and after the passing of this act, it shall and may be lawful in the several cases recited in the said clauses, for the court martial to pronounce sentence of death, or to inflict such other punishment as the nature and degree of the offence shall be found to deserve."

thereto, to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, pirate, or rebel, being convicted of any such offence by the sentence of the court martial, shall suffer death.

Desertion,  
and enter-  
taining de-  
serters.

XVI. Every person in or belonging to the fleet, who shall desert or entice others so to do, shall suffer death, or such other punishment as the circumstances of the offence shall deserve, and a court martial shall judge fit; and if any commanding officer of any of his Majesty's ships or vessels of war shall receive or entertain a deserter from any other of his Majesty's ships or vessels, after discovering him to be such deserter, and shall not with all convenient speed give notice to the captain of the ship or vessel to which such deserter belongs; or if the said ships or vessels are at any considerable distance from each other, to the secretary of the admiralty, or to the commander in chief, every person so offending, and being convicted thereof by the sentence of the court martial, shall be cashiered.

Convoys.

XVII. The officers and seamen of all ships appointed for convoys and guard of merchant ships, or of any other, shall diligently attend upon that charge, without delay, according to their instructions in that behalf; and whosoever shall be faulty therein, and shall not faithfully perform their duty, and defend the ships and goods in their convoy without either diverting to other parts or occasions, or refusing or neglecting to fight in their defence if they be assailed, or running away cowardly, and submitting the ships in their convoy to peril and hazard; or shall demand or exact any money or other reward from any merchant or master for conveying of any ships or vessels intrusted to their care, or shall misuse the masters or mariners thereof, shall be condemned to make reparation of the damage to the merchants, owners, and others,

as the court of admiralty shall adjudge; and also be punished criminally according to the quality of their offences, be it by pains of death, or other punishment, according as shall be adjudged fit by the court martial.

XVIII. If any captain, commander, or other officer of any of his Majesty's ships or vessels, shall receive on board, or permit to be received on board such ship or vessel, any goods or merchandizes whatsoever, other than for the sole use of the ship or vessel, except gold, silver, or jewels, and except the goods and merchandizes belonging to any merchant, or other ship or vessel which may be shipwrecked, or in imminent danger of being shipwrecked, either on the high seas, or in any port, creek, or harbour, in order to the preserving them for their proper owners, and except such goods or merchandizes, as he shall at any time be ordered to take or receive on board by order of the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral for the time being; every person so offending, being convicted thereof by the sentence of the court martial, shall be cashiered, and be for ever afterwards rendered incapable to serve in any place or office in the naval service of his Majesty, his heirs and successors\*.

Receiving  
goods and  
merchan-  
dize on  
board.

#### XIX. If

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\* By an after clause in this act, it is further enacted, that, from and after the 25th of December 1749, if any captain, commander, or other officer of any of his Majesty's ships or vessels shall receive on board, or permit or suffer to be received on board such ship or vessel, any goods or merchandizes contrary to the true intent and meaning of the 18th article of this act, every such captain, commander, or other officer, shall, for every such offence, over and above any punishment inflicted by this act, forfeit and pay the value of all and every such goods and merchandizes so received or permitted or suffered to be received on board as aforesaid, or the sum of 500l. of lawful money of Great Britain, at the election of the informer or person who shall sue for the same, so that no more than one of these penalties or forfeitures shall be sued for and recovered by

Mutinous  
assembly.

Uttering  
words of  
sedition and  
mutiny.

Contempt  
to superior  
officers.

Concealing  
traiterous  
or muti-  
nous de-  
signs, &c.

XIX. If any person in or belonging to the fleet shall make, or endeavour to make, any mutinous assembly, upon any pretence whatsoever, every person offending herein, and being convicted thereof by the sentence of the court martial, shall suffer death. And if any person in or belonging to the fleet shall utter any words of sedition or mutiny, he shall suffer death, or such other punishment as a court martial shall deem him to deserve. And if any officer, mariner, or soldier, in or belonging to the fleet, shall behave himself with contempt to his superior officer, such superior officer being in the execution of his office, he shall be punished according to the nature of his offence, by the judgment of a court martial.

XX. If any person in the fleet shall conceal any traiterous or mutinous practice, or design, being convicted thereof by the sentence of a court martial, he shall suffer death, or such other punishment as a court martial shall think fit; and if any person, in or belonging to the fleet, shall conceal any traiterous or mutinous words, spoken by any, to the prejudice of his Majesty or government, or any words, practice, or design, tending to the hindrance of the service, and shall not forthwith reveal the same to the commanding officer; or being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the

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virtue of this act. One moiety of which penalties or forfeitures shall be forfeited and paid to the person who shall inform and sue for the same; and the other moiety thereof, to and for the use of the Royal Hospital at Greenwich; which forfeiture shall be sued for and recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, or in the High Court of Admiralty, at the election of the informer or person who shall sue for the same, and the court shall award such costs to the parties as shall be just; and in all cases where judgment or sentence shall be given against any such offender, the court shall with all convenient speed certify the same to the lord high admiral, or to the commissioners for executing the said office.

same,

same, he shall be punished, as a court martial shall think he deserves.

XXI. If any person in the fleet shall find cause of complaint of the unwholesomeness of the victual, or upon other just grounds, he shall quietly make the same known to his superior, or captain, or commander in chief, as the occasion may deserve, that such present remedy may be had, as the matter may require; and the said superior, captain, or commander in chief, shall, as far as he is able, cause the same to be presently remedied; and no person in the fleet, upon any such or other pretence, shall attempt to stir up any disturbance, upon pain of such punishment as a court martial shall think fit to inflict, according to the degree of the offence.

No person upon any pretence to attempt to stir up disturbance.

XXII. If any officer, mariner, soldier, or other person in the fleet, shall strike any of his superior officers, or draw, or offer to draw, or lift up any weapon against him, being in the execution of his office, on any pretence whatsoever, every such person being convicted of any such offence, by the sentence of a court martial, shall suffer death; and if any officer, mariner, soldier, or other person in the fleet, shall presume to quarrel with any of his superior officers, being in the execution of his office, or shall disobey any lawful command of any of his superior officers; every such person being convicted of any such offence by the sentence of a court martial, shall suffer death, or such other punishment as shall, according to the nature and degree of the offence, be inflicted upon him, by the sentence of a court martial.

Striking a superior officer.

Quarrelling.

Disobedience.

XXIII. If any person in the fleet shall quarrel or fight with any other person in the fleet, or use reproachful or provoking speeches or gestures, tending to make any quarrel or disturbance, he shall, upon being convicted thereof, suffer such punishment as the offence shall deserve, and a court martial shall impose.

Fighting.

Provoking speeches, &c.

Embezzlement of stores.

XXIV. There shall be no wasteful expence of any powder, shot, ammunition, or other stores in the fleet, nor any embezzlement thereof, but the stores and provisions shall be carefully preserved, upon pain of such punishment to be inflicted upon the offenders, abettors, buyers, and receivers (being persons subject to naval discipline) as shall be by a court martial found just in that behalf.

Burning a magazine, ship, &c.

XXV. Every person in the fleet, who shall unlawfully burn, or set fire to any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle, or furniture thereunto belonging, not then appertaining to an enemy, pirate, or rebel, being convicted of any such offence, by the sentence of a court martial, shall suffer death.

Steering and conducting ships, &c.

XXVI. Care shall be taken in the conducting and steering of any of his Majesty's ships, that through wilfulness, negligence, or other defaults, no ship be stranded, or run upon any rocks or sands, or split, or hazarded, upon pain, that such as shall be found guilty therein, be punished by death, or such other punishment as the offence by a court martial shall be judged to deserve.

Sleeping, negligence, and forsaking a station.

XXVII. No person in or belonging to the fleet shall sleep upon his watch, or negligently perform the duty imposed on him, or forsake his station, upon pain of death, or such other punishment as a court martial shall think fit to impose, and as the circumstance of the case shall require.

Murder.

XXVIII. All murders committed by any person in the fleet, shall be punished with death, by the sentence of a court martial.

Sodomy.

XXIX. If any person in the fleet, shall commit the unnatural and detestable sin of buggery or sodomy, with man

man or beast, he shall be punished with death, by the sentence of a court martial.

XXX. All robbery committed by any person in the fleet, shall be punished with death, or otherwise, as a court martial upon consideration of circumstances shall find meet. Robbery.

XXXI. Every officer or other person in the fleet, who shall knowingly make or sign a false muster or muster book, or who shall command, counsel, or procure the making or signing thereof, or who shall aid or abet any other person in the making or signing thereof, shall, upon proof of any such offence being made before a court martial, be cashiered, and rendered incapable of further employment in his Majesty's naval service. False musters.

XXXII. No provost martial belonging to the fleet shall refuse to apprehend any criminal, whom he shall be authorized by legal warrant to apprehend; or to receive or keep any prisoner committed to his charge; or wilfully suffer him to escape, being once in his custody; or dismiss him without lawful order; upon pain of such punishment as a court martial shall deem him to deserve. Apprehending and keeping criminals.  
And all captains, officers, and others in the fleet, shall do their endeavour to detect, apprehend, and bring to punishment all offenders, and shall assist the officers appointed for that purpose therein, upon pain of being proceeded against, and punished by a court martial, according to the nature and degree of the offence. Bringing offenders to punishment.

XXXIII. If any flag officer, captain, or commander, or lieutenant belonging to the fleet, shall be convicted before a court martial, of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer, he shall be dismissed from his Majesty's service, Behaving unbecoming an officer.

Mutiny, desertion, disobedience when on shore, in the king's dominions.

XXXIV. Every person being in actual service, and full pay, and part of the crew in or belonging to any of his Majesty's ships or vessels of war, who shall be guilty of mutiny, desertion, or disobedience to any lawful command; in any part of his Majesty's dominions on shore, when in actual service, relative to the fleet, shall be liable to be tried by a court martial, and suffer the like punishment for every such offence, as if the same had been committed at sea, on board any of his Majesty's ships or vessels of war.

Crimes committed on shore out of the king's dominions.

XXXV. If any person who shall be in actual service, and full pay in his Majesty's ships and vessels of war, shall commit upon the shore, in any place or places out of his Majesty's dominions, any of the crimes punishable by these articles and orders, the person so offending shall be liable to be tried and punished for the same, in like manner, to all intents and purposes, as if the said crimes had been committed at sea, on board any of his Majesty's ships or vessels of war.

Crimes not mentioned in this act.

XXXVI. All other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea.



## No. II. Courts Martial Statutes.

*Abstract of Sections respecting Courts Martial, contained in the Act of Parliament, 22 Geo. II. c. 33 intituled, An Act for amending, explaining, &c. reducing into one Act of Parliament the Laws relating to the Government of His Majesty's Ships, Vessels, and Forces by Sea; likewise, Clauses of Amendment in the Act 19 Geo. III. c. 17.*

## Section III.

**N**O person convicted of any offence shall by the sentence of any court martial be adjudged to be imprisoned for a longer term than the space of two years.

Not more than two years imprisonment.

## Section IV.

Nothing contained in the articles of war shall extend, or be construed to extend, to empower any court martial to be constituted by virtue of this act, to proceed to the punishment or trial of any of the offences specified in the several articles (other than the offences specified in the 5th, 34th, and 35th articles and orders) which shall not be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in the haven, river, or creek, within the jurisdiction of the Admiralty; and which shall not be committed by such persons as, at the time of the offence committed, shall be in actual service and full pay in the fleet or ships of war of his Majesty, his heirs or successors, such persons only excepted, and for such offences only as are described in the fifth article of war.

Jurisdiction of a court martial.

## Section V.

Nothing in this act contained shall extend, or be construed to extend, to empower any court martial to proceed to the punishment or trial of any land officer or soldier, on

No land officer or soldier to be tried.

board any transport ship, for any offences specified in the several articles in this act.

#### Section VI.

Commis-  
sions to be  
granted to  
assemble  
courts mar-  
tial.

To devolve  
in foreign  
parts, with  
the com-  
mand of a  
fleet or  
squadron.

The lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral of Great Britain, for the time being, shall have full power and authority to grant commissions to any officer commanding in chief, any fleet, or squadron of ships of war, to call and assemble courts martial, consisting of commanders and captains. And that in case any officer commanding in chief any fleet or squadron of ships of war (who shall be authorized by the lord high admiral, or the commissioners for executing the office of lord high admiral, for the time being, to call and assemble courts martial in foreign parts) shall happen to die, or be recalled, or removed from his command, then the officer upon whom the command of the said fleet or squadron shall devolve, and so from time to time, the officer who shall have the command of the said fleet or squadron shall have the same power to call and assemble courts martial, as the first commander in chief of the said fleet or squadron was invested with.

#### Section VII.

No com-  
mander in  
chief in fo-  
reign parts  
to preside  
at a court  
martial.

No commander in chief of any fleet or squadron of his Majesty's ships, or detachment thereof, consisting of more than five ships, shall preside at any court martial, in foreign parts, but that the officer next in command to such officer commanding in chief, shall hold such court martial, and preside thereat; any law, custom, or usage to the contrary notwithstanding.

#### Section VIII.

Command-  
ers of de-  
tachments  
to be im-

In case any commander in chief of any fleet or squadron of his Majesty's ships or vessels of war, in foreign parts,

parts, shall detach any part of such fleet or Squadron, every commander in chief shall, and is hereby authorised and required, by writing under his hand, to empower the chief commander of the Squadron or detachment, so ordered on such separate service (and in case of his death or removal, the officer to whom the command of such separate Squadron or detachment shall belong), to hold courts martial, during the time of such separate service, or until the commander of the said detachment for the time being shall return to his commander in chief, or shall come under the command of any other his superior officer, or return to Great Britain or Ireland.

powered to  
hold courts  
martial.

#### Section IX.

If any five or more of his Majesty's ships or vessels of war shall happen to meet together in foreign parts, then and in such case, it shall be lawful for the senior officer of the said ships or vessels to hold courts martial, and preside thereat, from time to time as there shall be occasion, during so long time as the said ships or vessels of war, or any five or more of them, shall continue together.

Five ships  
meeting,  
senior officer  
may  
hold courts  
martial and  
preside.

#### Section X.

That where any material objection occurs, which may render it improper for the person who is next in command to the senior officer, or commander in chief of any fleet or Squadron of his Majesty's ships of war in foreign parts, to hold courts martial, or preside thereat, in such case it shall be lawful for the lord high admiral, or commissioners for executing the office of lord high admiral for the time being, as also the commander in chief of any such fleet or Squadron of his Majesty's ships in foreign parts respectively, to appoint the third officer in command, to preside at, or hold such court martial.

If a material  
objection  
to the  
second officer  
in command,  
the  
third may  
be appointed  
to hold  
courts martial.

#### Section

## Section XI.

In Great Britain or Ireland, the admiralty may appoint the first, second, or third officer in command in any port to hold courts martial.

It shall be lawful for the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral for the time being, and they are hereby respectively authorized from time to time, as there shall be occasion, to direct any flag officer or captain of any of his Majesty's ships of war, who shall be in any part of Great Britain or Ireland, to hold courts martial, in any such ports, provided such flag officer or captain be the first, second, or third in command in such port, as shall be found most expedient, and for the good of his Majesty's service; and such flag officer or captain, so directed to hold courts martial, shall preside at such court martial, any thing herein contained to the contrary notwithstanding.

## Section XII.

Court martial not to consist of more than thirteen or less than five next in seniority to the officer presiding.

No courts martial to be held or appointed by virtue of this present act, shall consist of more than thirteen or of less than five persons, to be composed of such flag officers, captains, or commanders then and there present, as are next in seniority to the officer who presides at the court martial.

## Section XIII.

Particular number not to be ascertained by the admiralty or officer empowered to order or hold courts martial.

Nothing herein contained shall extend, or be construed to extend, to authorize and empower the lord high admiral, or the commissioners for executing the office of lord high admiral, or any officer empowered to hold courts martial, to direct or ascertain the particular number of persons of which any court martial, to be held or appointed by virtue of this present act, shall consist.

## Section XIV.

In what cases commanders may assist,

In case any court martial shall be appointed to be held at any place where there are no less than three, nor yet  
so

so many as five officers of the degree and denomination of a post captain, or of a superior rank, to be found, then it shall be lawful for the officers, at the place appointed for holding such court martial, who is to preside at the same, to call to his assistance as many of the commanders of his Majesty's vessels, under the rank and degree of a post captain, as, together with the post captains then and there present, will make up the number of five, to hold such court martial.

#### Section XV.

No member of any court martial, after the trial is begun, shall go on shore till sentence be given, but remain on board the ship, in which the court shall first assemble, except in case of sickness, to be judged of by the court, upon pain of being cashiered from his Majesty's service; nor shall the proceedings of the said court be delayed by the absence of any of its members, provided a sufficient number doth remain to compose the said court, which shall and is hereby required to sit from day to day (Sundays always excepted), until the sentence be given\*.

No member to go on shore before sentence be given.

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\* It having been found by experience, that the confining members of courts martial to the ships in which such courts martial were ordered to be assembled, until sentence was given, had been attended with great inconvenience and prejudice to the healths of officers summoned to attend as members—By 19 Geo. III. cap. 17. sect. 2. this clause of the act is repealed and made void to all intents and purposes. Provided always, that the proceedings of any court martial shall not be delayed by the absence of any of its members, when a sufficient number doth remain to compose such court, which is required to sit from day to day (Sunday always excepted) until the sentence be given. And no member of the said court martial shall absent himself from the said court, during the whole course of the trial, upon pain of being cashiered from his Majesty's service, except in case of sickness, or other extraordinary and indispensable occasion, to be judged of by the said court.

## Section XVI.

Form of  
oath to be  
administered.

Upon all trials of offenders by any court martial, all the officers present who are to constitute the said court martial, shall, before they proceed to such trial, take such oath as is herein-after mentioned, upon the Holy Evangelists, before the court; which oath the judge advocate, or his deputy, or the person appointed to officiate as such, is hereby authorized and required to administer in the words following; (that is to say),

*I, A. B. do swear, that I will duly administer justice, according to the articles and orders established by an act passed in the twenty-second year of the reign of his Majesty King George II. for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea, without partiality, favour, or affection; and if any case shall arise which is not particularly mentioned in the said articles and orders, I will duly administer justice according to my conscience, the best of my understanding, and the custom of the navy in like cases; and I do further swear, that I will not upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court martial, unless thereunto required by act of parliament.* So help me God. -

Oath to be  
administered  
to the  
judge advocate.

As soon as the said oath shall have been administered to the respective members, the president of the court is hereby authorized and required to administer to the judge advocate, or the person officiating as such, an oath in the following words;

*I, A. B. do swear, that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court martial, unless thereunto required by act of parliament.*

So help me God.

Section

## Section XVII.

In case any person in the fleet, being called upon to give evidence, at any court martial, shall refuse to give evidence upon oath, or shall prevaricate in his evidence or behave with contempt to the court, it shall and may be lawful for such court martial to punish every such offender by imprisonment, at the discretion of the court; such imprisonment, not to continue longer than three months, in case of such refusal or prevarication, nor longer than one month in the case of such contempt. And that all and every person and persons who shall commit any wilful perjury, in any evidence or examination, upon oath at any such court martial, or who shall corruptly procure or suborn any person to commit such wilful perjury, shall and may be prosecuted in his Majesty's court of King's Bench, by indictment or information, and every issue joined in any such indictment or information, shall be tried by good and lawful men of the county of Middlesex, or such other county as the said court of King's Bench shall direct; and all and every person and persons, being lawfully convicted upon any such indictment or information, shall be punished with such pains and penalties as are inflicted, for the like offences respectively, by two acts of parliament, the one made in the fifth year of the reign of Queen Elizabeth, intituled, *An act for punishment of such persons as shall procure or commit any wilful perjury*; and the other made in the second year of the reign of his present Majesty, intituled, *An act for the more effectual preventing and further punishment of forgery, perjury, and subornation of perjury, and to make it felony to steal bonds, notes, or other securities for payment of money.*

Court may punish persons refusing to give evidence, or prevaricating, or behaving with contempt.

Witnesses committing perjury how to be prosecuted.

5 Eliz. c. 9.

2 Geo. II. c. 25.

## Section XVIII.

And be it further enacted by the authority aforesaid, That in every information or indictment to be prosecuted

The offence only to be set forth in

by

any infor-  
mation.

by virtue of this act for any such offence, it shall be sufficient to set forth the offence charged upon the defendant, without setting forth the commission or authority for holding the court martial, and without setting forth the particular matter tried, or to be tried, directed, or intended to be tried before such court.

#### Section XIX.

Sentences  
of death  
(except in  
cases of  
mutiny)  
not to be  
executed  
without di-  
rections  
from the  
admiralty,  
&c.

No sentence of death given by any court martial held within the narrow seas (except in cases of mutiny) shall be put in execution till after the report of the proceedings of the said court shall have been made to the lord high admiral, or commissioners for executing the office of lord high admiral; and his or their directions shall have been given therein; and if the said court shall have been held beyond the narrow seas, then such sentence of death shall not be carried into execution but by order of the commander of the fleet or squadron wherein such sentence was passed; and in cases where sentence of death shall be passed in any squadron, detached from any other fleet or squadron upon a separate service, then such sentence of death (except in cases of mutiny) shall not be put in execution, but by order of the commander of the fleet or squadron from which such detachment shall have been made, or of the lord high admiral, or commissioners for executing the office of lord high admiral; and in cases where sentence of death shall be passed in any court martial held by the senior officer of five or more of his Majesty's ships which shall happen to meet together in foreign parts, pursuant to the power herein before given, then such sentence of death (except in cases of mutiny) shall not be carried into execution but by order of the lord high admiral, or commissioners for executing the office of lord high admiral.

Section



## Section XX.

The judge advocate for the time being, of any fleet, or his deputy, shall have full power and authority, and is hereby required to administer an oath to any witness, at any trial by court martial; and in the absence of the judge advocate and his deputy, the court martial shall have full power and authority to appoint any person to execute the office of judge advocate.

Judge advocate to administer oath to witnesses.

## Section XXI.

All the powers given by the several articles and orders established by this act, shall remain and be in full force with respect to the crews of such of his Majesty's ships as shall be wrecked, or be otherwise lost or destroyed; and all the command, power, and authority given to the officers of the said ship or ships shall remain and be in full force, as effectually as if such ship or ships to which they did belong were not so wrecked, lost, or destroyed, until they shall be regularly discharged from his Majesty's further service, or removed into some other of his Majesty's ships of war, or until a court martial shall be held, pursuant to the custom of the navy in such cases, to enquire into the causes of the loss of the said ship or ships; and if upon such enquiry it shall appear by the sentence of the court martial that all or any of the officers or seamen of the said ship or ships did their utmost to preserve, get off, or recover the said ship or ships, and since the loss thereof have behaved themselves obediently to their superior officers according to the discipline of the navy, and the said articles and orders herein before established, then all the pay and wages of the said officers and seamen, or of such of them as shall have done their duty as aforesaid, shall continue and go on, and be paid to the time of their discharge or death; or if they shall be then alive, to the time of the holding of such court martial, or removal

This act to be in force with regard to crews of ships lost.

Pay of such ships reserved.

into some other of his Majesty's ships of war; and every such officer and seaman of any of his Majesty's ships of war, who, after the wreck or loss of his ship, shall act contrary to the discipline of the navy, and the several articles and orders herein before established, or any of them, shall be sentenced by the said court martial, and punished, as if the ship to which he did belong was not so wrecked, lost, or destroyed.

#### Section XXII:

Continu-  
ance of  
wages to  
men be-  
longing to  
ships taken  
by an ene-  
my.

All the pay and wages of such officers and seamen of any of his Majesty's ships as are taken by the enemy, and upon enquiring at a court martial shall appear by the sentence of the said court to have done their utmost to defend the said ship or ships, and since the taking thereof, to have behaved themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders herein before established, shall continue and go on, and be paid, from the time of their being so taken, to the time of the holding of such court martial, or until they shall be regularly discharged from his Majesty's service, or removed into some other of his Majesty's ships of war, or (if they shall die in captivity, or not live to the time of the holding of such court martial) to the time of their death, in such manner, and not otherwise, as if the said ship or ships to which they did belong respectively, was not or were not so taken.

#### Section XXIII.

Persons not  
to be tried  
after a cer-  
tain time.

No person or persons, not flying from justice, shall be tried or punished by any court martial for any offence to be committed against this act, unless the complaint of such offence be made in writing to the lord high admiral for the time being, or any commander in chief of his Majesty's squadrons or ships empowered to hold courts martial,

tial, or unless a court-martial to try such offender shall be ordered by the said lord high admiral, or the said commissioners, or the said commander in chief, either within three years after such offence shall be committed; or within one year after the return of the ship, or of the squadron to which such offender shall belong, into any of the ports of Great Britain or Ireland, or within one year after the return of such offender into Great Britain or Ireland.

#### Section XXIV.

And whereas by the said act, intituled, *An Act for the more effectual suppressing of Piracy*, it is, amongst other things, enacted in the following words, That the said captain, commander, or other officer of the said ship or vessel of war, and all and every the owners and proprietors of such goods and merchandizes, put on board such ship or vessel of war as aforesaid, shall lose, forfeit and pay the value of all and every such goods and merchandizes, so put on board as aforesaid; one moiety of such full value to such person or persons as shall make the first discovery, and give information of or concerning the said offence; the other Moiety of such full value to and for the use of Greenwich Hospital; all which forfeitures shall and may be sued for and recovered in the High Court of Admiralty: Now, for making the said in part recited act more useful and effectual, be it enacted by the authority aforesaid, That, from and after the Twentieth day of December one thousand seven hundred and forty-nine, if any captain, commander, or other officer of any of his Majesty's ships or vessels, shall receive on board, or permit or suffer to be received on board such ship or vessel, any goods or merchandizes, contrary to the true intent and meaning of the Eighteenth Article in this act before-mentioned and hereby enacted, every such captain, commander, or other officer, shall, for every

Penalty on officers receiving on board any goods contrary to article 18 of this act.

Applica-  
tion of the  
forfeiture,

and method  
of recovery.

The court  
to certify to  
the lords of  
the Admi-  
ralty the  
judgment.

Limitation  
of the pow-  
ers of this  
act.

such offence, over and above any punishment inflicted by this act, forfeit and pay the value of all and every such goods and merchandizes so received or permitted, or suffered to be received on board as aforesaid, or the sum of five hundred pounds of lawful money of Great Britain, at the election of the informer, or person who shall sue for the same, so that no more than one of these penalties or forfeitures shall be sued for and recovered by virtue of this and the said in part recited act, or either of them, against the same person, for one and the same offence; one moiety of which penalties or forfeitures shall be forfeited and paid to the person who shall inform or sue for the same, and the other moiety thereof to and for the use of the royal hospital at Greenwich; which forfeiture shall be sued for and recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, or in the high court of Admiralty, at the election of the informer, or person who shall sue for the same; and the court shall award such costs to the parties as shall be just; and in all cases where judgment or sentence shall be given against any such offender, the court where such judgment or sentence shall be given, shall, with all convenient speed, certify the same to the lord high admiral, or to the commissioners for executing the said office.

#### Section XXV.

Provided always, That nothing in this act contained shall extend, or be construed to extend, to take away from the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral of Great Britain, or any vice-admiral, or any judge or judges of the admiralty, or his or their deputy or deputies, or any other officers or ministers of the admiralty, or any others having or claiming any admiral power, jurisdiction,

or authority within this realm, or any other the king's dominions, or from any person or court whatsoever, any power, right, jurisdiction, pre-eminence, or authority, which he or they, or any of them, lawfully hath, have, or had, or ought to have and enjoy, before the making of this act, so as the same person shall not be punished twice for the same offence.

*Clauses of amendment in the act of 19 Geo. III. c. 17, intituled, An act to explain and amend an Act, made in the twenty-second year of the reign of his late Majesty King George the second; &c.*

**W**HEREAS by an act, made in the twenty-second year of the reign of his late Majesty king George the Second, intituled, *An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea*; it is, among other things, enacted, That, from and after the twenty-fifth day of December one thousand seven hundred and forty-nine, no member of any court-martial, after the trial is begun, shall go on shore till sentence be given, but remain on board the ship in which the court shall first assemble, except in case of sickness, to be judged of by the court, upon pain of being cashiered from his majesty's service; nor shall the proceedings of the said court be delayed by the absence of any of its members, provided a sufficient number doth remain to compose the said court, which shall, and is thereby required to sit from day to day (Sunday always excepted) until the sentence be given: and whereas it hath been found by experience, that the confining members of courts-martial to the ship in which such courts-martial shall first assemble, until sentence be given, hath been attended with great inconveniencies

Preamble.

Recital of  
an act 22  
Geo. II.

Part of the  
said act re-  
pealed.

niencies and prejudice to the healths of officers summoned to attend as members of courts-martial; and it is highly necessary and expedient that such inconveniencies should be prevented in future; may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That so much and such part of the said recited act as directs that no member of any court-martial, after the trial has begun, shall go on shore till sentence be given, but remain on board the ship in which the court shall first assemble, except in case of sickness, to be judged of by the court, upon pain of being cashiered from his Majesty's service; and that the proceedings of the said court shall not be delayed by the absence of any of its members, provided a sufficient number doth remain to compose the said court, which is thereby required to sit from day to day (Sunday always excepted) until the sentence be given, shall be, and the same is hereby repealed and made void, to all intents and purposes whatsoever.

Proceedings  
of courts-  
martial not  
to be de-  
layed by the  
absence of  
any mem-  
bers, pro-  
vided  
enow re-  
main to  
make a  
court.

No member  
to be absent  
except on  
some extra-  
ordinary  
occasion.

Provided always, and be it enacted, That the proceedings of any court-martial shall not be delayed by the absence of any of its members, provided a sufficient number doth remain to compose such court, which shall, and is hereby required to sit from day to day (Sunday always excepted) until the sentence be given; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding: and no member of the said court-martial shall absent himself from the said court during the whole course of the trial, upon pain of being cashiered from his Majesty's service, except in case of sickness, or other extraordinary and indispensable occasion, to be judged of by the said court.

And whereas, by two clauses in the said act, passed in the twenty-second year of the reign of his late Majesty king George the Second, it is enacted and declared, That every person in the fleet, who, through cowardice, negligence, or disaffection, shall, in time of action, withdraw or keep back, or not come into the fight or engagement, or shall not do his utmost to take or destroy every ship which it shall be his duty to engage, and to assist and relieve all and every of his Majesty's ships, or those of his allies, which it shall be his duty to assist and relieve, and being convicted thereof by the sentence of a court-martial, shall suffer death; and also that every person in the fleet, who, through cowardice, negligence, or disaffection, shall forbear to pursue the chase of any enemy, pirate, or rebel, beaten or flying, or shall not relieve or assist a known friend in view, to the utmost of his power, and being convicted of any such offence by the sentence of a court-martial, shall suffer death: and whereas the restraining of the power of the court-martial to the inflicting of the punishment of death, in the several cases recited in the said clauses, may be attended with great hardship and inconvenience, be it enacted, That, from and after the passing of this act, it shall and may be lawful, in the several cases recited in the said clauses, for the court-martial to pronounce sentence of death, or to inflict such other punishment as the nature and degree of the offence shall be found to deserve.

Two clauses  
in the said  
act 22  
Geo. II. re-  
cited,

and altered.

No. III. Particulars relative to the Case of constituting a Court Martial to try the Earl of Torrington. [Referred to p. 104.]

THE constituting of a Court Martial to try Admiral Earl Torrington, in the reign of William III. was the subject of much debate, in both Houses of Parliament. The King was resolved it should be by a Court Martial, but the Earl and his friends maintained a right of being tried by his Peers. Doubts were started on the one side, as to the power of the Admiralty; for though it was admitted that the Lord High Admiral of England might have issued a commission for trying him, yet it was questioned whether any such authority was vested in the commissioners of the Admiralty or not; and though some great lawyers gave their opinions in the affirmative, yet it was judged expedient, to settle so important a point by the authority of Parliament \*.

To obviate these difficulties, a bill was brought in, for vesting in the commissioners of the Admiralty the same power in regard to granting commissions, which was already vested by law in the Lord High Admiral of England †.

The King appointed at the time a new Board of Admiralty, composed of seven members instead of five, as had been formerly, and to this Board it was, that the intended act gave the power of appointing Courts Martial for the trial of any officer of what rank soever, as a Lord High Admiral might do ‡.

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\* Campbell's Admirals, vol. II. p. 338.

† Stat. 2 William and Mary, sess. 2. cap. 2.

‡ The History and Proceedings of the House of Lords, vol. I. p. 405.



On the third reading of this bill in the House of Peers it occasioned warm debates; it was, however, carried by a majority of two only, and many of the Lords entered their protests for the following reasons:

“ Because this bill gives a power to Commissioners of the Admiralty to execute a jurisdiction, which, by the act of the 13 Car. II. intituled, *An act for establishing articles and orders, for the regulating and better government of his Majesty's navy, ships of war, and forces by sea*, we conceive they had not; whereby the Earl Torrington may come to be tried for his life, for facts committed several months before this power was given or desired; we think it reasonable that every man should be tried by that law that was known to be in force when the crime was committed.

“ It is by virtue of the said act of 13 Charles II. that the Earl of Torrington was judged by this house, not to have the privilege of a peer of this realm, for any offences committed against the said act; and there is no other law as we conceive by which the said earl could have been debarred from enjoying the privilege of a peer of this realm; which act making no mention of Commissioners of the Admiralty, but of a Lord High Admiral only, by whose authority all the powers given by that act are to be exercised, and without whose consent singly, no sentence of death can be executed, we think it of dangerous consequence to expound a law of this capital nature, otherwise than the literal words do import. As we conceive it without precedent to pass even explanatory laws, much less such as have a retrospect in them, in cases of life and death; so we think it not at all necessary to make such a precedent at this time, there being an undoubted legal way already established

Court of Delegates, where the Lord High Chancellor appoints a number of judges, if at any time, upon an ordinary act or sentence the court happens to be divided no order or sentence, can be obtained, though there is always a person of superior distinction placed at the head of every such commission of delegates.

I therefore conceive, that a Court Martial should observe the same reasonable rules that other courts of justice comply with; the point at issue may be reconsidered by the same judges, and if they should alter their opinions, that may produce a final determination of the point in question; but if the several members of the Court Martial adhere to their first opinion, upon which there is an equality, I think the question must remain undecided.

G. PAUL.

*Doctors Commons, 28th  
of June 1746.*

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No. V. Letter from the Members of the Court Martial on Admiral Keppel, to the Admiralty, relative to their long Confinement.

[Referred to p. 172.]

**H**AVING now been in confinement six and thirty days, since we first assembled to sit on the trial of Admiral Keppel, greatly to the prejudice of our healths, we cannot in justice to the service to which we have the honour to belong, and to those officers who may be hereafter required to submit to like injuries, let pass an opportunity, that appears to us so proper for representing to the Lords of the Admiralty, how much we lament that officers of our rank should, by law, be made liable to so severe an hardship,

hardship, which, from any reason occurring to us, we cannot conceive to be necessary, either to the parties on whose account a Court Martial is held, useful to the public, or consistent with the character of officers who are called on to sit as judges; from these considerations we are desirous to make known our sentiments to their lordships, in hopes they will take such measures, as may appear to them to be requisite, for the removal of an oppression so long and so justly complained of, and which we flatter ourselves their lordships will more readily acquiesce in, when it is considered, that the Judge Advocate, who is a part of the Court, is at liberty upon every adjournment to retire, whilst the judges are obliged to continue in confinement, however long it may be, till sentence shall be given.

We are, &c.

<i>T. Pye,</i>	<i>J. Moutray,</i>
<i>R. Roddam,</i>	<i>C. Boteler,</i>
<i>T. Penny,</i>	<i>M. Arbuthnot,</i>
<i>A. Duncan,</i>	<i>F. S. Drake,</i>
<i>J. Montagu,</i>	<i>W. Bennet,</i>
<i>M. Milbank,</i>	<i>J. Cranston.</i>

*Court Room, Portsmouth,  
11th February 1779.*

*To Philip Stephens, Esq.*

No. VI. Letter from Mr. Stephens to Admiral Sir Thomas Pye, and Order of Council establishing a first Captain to Flag Officers.

[Referred to p. 174, 175.

'Sir,

8th of June 1779.

**H**AVING communicated to my Lords Commissioners of the Admiralty your letter of the 7th instant, respecting the propriety of captain Kempenfelt, first captain to admiral Sir Charles Hardy, sitting at a Court Martial above a senior captain; I am in return commanded by their lordships, to send you herewith a copy of his late Majesty's order in council, establishing a first captain to flag officers, having the command of a fleet or squadron of twenty ships of the line, with the same rank as is allowed to the first captain to the admiral and commander in chief of the fleet, under which establishment captain Kempenfelt has been appointed first captain to Sir Charles Hardy, and to refer you to the third article of the General Printed Instructions, under the head of *Rank and Command*, by which you will see, that he is, as such, to be esteemed as a rear admiral, and to take place at all Councils of War, and also at Courts Martial, next to the junior rear admiral.

I am, &c.

PHILIP STEPHENS.

*Admiral Sir Thomas Pye.*

At the Court of St. James's the Twenty-second Day of March 1747.

PRESENT,

The King's most Excellent Majesty in Council.

WHEREAS there was this day read at the Board, a memorial from the Lords Commissioners of the Admiralty, dated

dated the third of last month, setting forth, that by the establishment of the navy, two captains are allowed to the admiral of the fleet when he goes to sea, and only one to all other flag officers, and therefore proposing (for the reasons therein contained), that a flag officer commanding a fleet of twenty ships of the line of battle, may have two captains allowed to him, in the same manner as is now allowed to the admiral of the fleet. His Majesty taking the same into his royal consideration, is pleased to approve thereof, and to order, as it is hereby ordered, with the advice of his privy council, that whenever any flag officer shall be appointed to command a fleet or squadron of twenty ships of the line of battle, whether all his Majesty's own ships, or united on the same service with those of his allies, that he be allowed a first captain, with the pay and rank of a rear admiral, and all other privileges and profits belonging to the said post, in the same manner as is allowed to the first captain of the admiral of his Majesty's fleet; but that the said appointment do continue only during the time of the flag officer's command. And the right honourable the Lords Commissioners of the Admiralty are to cause his Majesty's pleasure, hereby signified, to be carried into execution.

(Signed) W. SHARPE.

No. VII. Copy of a Letter from the Deputy Judge Advocate, to the Secretary of the Admiralty, relative to Sir Roger Curtis sitting as a Member of a Court Martial, in preference to Captains senior to him on the List. [Referred to p. 176.

Sir,

Portsmouth, October 1790.

Section 1.

**D**OUBTS having arisen in the minds of several of the flag officers and senior captains at this port, whether a Court Martial assembled in the manner the last was, is legal, owing to Sir Roger Curtis sitting as member thereof, as first captain to the commander in chief, in preference to many captains present, who are senior to him on the list, I am directed by the honourable Admiral Barrington, to request the Lords Commissioners of the Admiralty to state the case to the crown lawyers for their opinion upon the legality.

The act of parliament directs that the court shall be composed of such flag officers, captains, and commanders, then and there present, as are next in seniority to the officers who preside at the Court Martial.

The third article of Instructions under the head of *Rank and Command*, says, that the first captain to the commander in chief shall be esteemed as a rear admiral, and take place at all councils of war, and *courts martial*, next to the junior rear admiral.

It is understood by them, when these instructions were framed, that the person who filled the office of first captain to the commander in chief was, in all cases, the senior captain on the list.

I am, &c.

Philip Stephens, Esq.

Case

*Case and opinion of counsel on the question—Whether the first captain to the commander in chief (not being within the thirteenth in seniority on the list), had a right to compose part of the court, and to sit next the junior rear admiral.* Section 2.

The lords commissioners of the admiralty have directed this case to be laid before his Majesty's advocate, attorney and solicitor generals, and the advocate and counsel for the affairs of the admiralty and navy.

First, Whether the third article in the Printed Instructions, confirmed by the order in council, vested in first captains a preferable right to sit at Courts Martial, in exclusion of captains senior on the list, or only gave them rank and place at such courts, when their seniority as captains entitled them to sit there.

Secondly, Supposing the said article vested first captains with a preferable right to sit, in exclusion of captains senior to them, then, whether so much of the said article as gave them that right, was not annulled or controuled by the words in the twelfth section of the act of parliament, which directs that Courts Martial shall be composed of such flag officers, captains, or commanders, then and there present, as are next in *seniority* to the officer who presides, &c. or at least so far annulled and controuled as renders it necessary for the first captain to be otherwise entitled to sit, as being one of such captains next in seniority.

And upon the whole, whether Sir Roger Curtis was legally entitled to sit as a member of the Court Martial held on lieutenant Bligh \*.

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\* *N. B.* Sir Roger Curtis, by his *seniority on the list*, did not come within the thirteen members to compose the court.

## OPINION.

Section 2. We are of opinion, that the third article in the Printed Instructions, conformed by the order in council, vested in first captains a preferable right to sit at Courts Martial in exclusion of captains senior on the list, and not merely a rank and place, at such courts, when their seniority entitled them to sit.

We are of opinion, that the right of such captains so vested by the said third article, was annulled by the words in the twelfth section of the statute, so as to disable them from sitting at Courts Martial, when *their seniority* would not entitle them to it.

We are consequently of opinion, that Sir Roger Curtis was not legally entitled to sit as a member of the Court Martial held on lieutenant Bligh.

(Signed) { Wm. Scott,  
A. Macdonald,  
J. Scott,  
Thomas Bever,  
F. C. Cust.

Section 3. *Copy of a letter from Sir Hyde Parker to the right honourable Lord Hood, vice admiral of the blue, commander in chief, &c. respecting his right to sit at courts martial next the junior rear admiral.*

*The Victory, at Spithead,  
22d of June 1791.*

My Lord,

Having been summoned to assist at a Court Martial, which met on the 20th instant on board his Majesty's ship the Royal William, I claimed, on the members seating themselves, to take the place next in rank to the junior rear admiral then present, agreeable to what I understand to be the true purport and meaning of the third article under



under the head of *Rank and Command*, of the regulations and instructions, relating to his Majesty's service at sea—Being in this over-ruled by a decision of the majority of the officers then assembled, who were of opinion, I ought to take my place in the court according to my rank as a post captain only, without regard to that superior rank, which the article above referred to appears to give me; and having in this determination acquiesced, that the business before the court should not be delayed, without being satisfied as to its propriety; in order to resolve the doubts, which several officers with myself entertain on this point, I am to request that your lordship will be pleased to apply to the Lords Commissioners of the Admiralty to know,

Whether the *first captain* to an admiral of your lordship's rank, and commanding in chief a squadron of his Majesty's ships and vessels equally numerous with that at present under your lordship's command, and being by the seniority of his commission within the number required to constitute a court, *shall be esteemed, as a rear admiral, and take place at all councils of war, and also at courts martial, next to the junior rear admiral.*

I have the honour to be,  
My lord, &c.

*The Right Hon. Lord Hood, &c.*

*Copy of a letter from Mr. Secretary Stephens, in answer to Sir Hyde Parker's letter, with opinion thereon.* Section 4.

My Lord, *Admiralty office, 24th of June 1791.*

I Have communicated to my lords commissioners of the Admiralty your lordship's letter of the 22d instant, transmitting one you had received from Sir Hyde Parker, your first captain, requesting, for the reasons therein given, to be informed, whether the *first captain* to an admiral of your  
Y 2 lordship's

lordship's rank, and commanding in chief a squadron of his Majesty's ships and vessels equally numerous with that at present under your command, and being by the seniority of his commission within the number required to constitute a court, "*shall be esteemed as a rear admiral, and take place at all councils of war, and also at courts martial, next to the junior rear admiral.*"

And in return I am commanded by their lordships to acquaint you, that they are clearly of opinion, that the first captain to the admiral of the fleet, or any flag officer having a squadron of twenty sail of ships of the line under his command, being by the seniority of his commission as a captain within the number of officers required to constitute a court martial, ought to be esteemed as a rear admiral, and take place at courts martial, as well as at councils of war, next to the junior rear admiral, agreeable to the third article of the General Printed Instructions under the head of Rank and Command.

I have the honour to be,

My Lord, &c.

*Vice Admiral Lord Hood, &c. Spithead.*

Section 5. *Copy of a letter from the Deputy Judge Advocate to Mr. Stephens, relative to Sir Hyde Parker.*

Sir,

YOU will be pleased to inform the lords commissioners of the Admiralty, that, pursuant to their lordships' order, the flag officers and captains assembled on board the Royal William for the purpose of composing a court-martial, for the trial of Thomas Jones, a seaman, belonging to his Majesty's sloop Speedy, on the charge therein mentioned; but a doubt having arisen in the minds of some of the members, whether Sir Hyde Parker, (who comes within  
the

the number directed by act of parliament to compose the court) should take his seat at the court martial, next the junior rear admiral, under the directions of the third article in the Naval Instructions, as first captain to the commander in chief, in preference to captains who will also compose part of the court, and who are senior to him on the list; or whether he should take his seat as a captain, according to his seniority on the list.

I am requested to desire their lordships will be pleased to order their solicitor to state the case, for the opinion of such counsel, as they shall think proper, on the questions here underwritten.

First, Whether Sir Hyde Parker, as the first captain to the commander in chief, commanding twenty sail of the line and upwards, being by his seniority on the list of captains within the number of persons directed by the twelfth section of the act of 22 Geo. II. to compose the court, has a right to take place at the court martial, next the junior rear admiral, in preference to captains, senior to him on the list, pursuant to the third article of the Naval Instructions, under the title of Rank and Command?

Secondly, Supposing Sir Hyde Parker, as first captain to such commander in chief, should be admitted to take place next to the rear admiral; whether or not his vote being given in that place, when there are two captains who are senior to him on the list, is consistent with the seventh article of the Naval Instructions, under the title of Courts Martial, which directs, *that the youngest member shall vote first, proceeding in order up to the president*, and whether or not a sentence being given in such case, may not be subject to the members of the court to be called on by a superior court of law, for illegality in their proceedings?

## Section 6.

*Opinion of counsel for the crown on the preceding question.*

Having considered the king's instructions, and the act of 22 Geo. II. c. 33. and the usage which has obtained since that act passed; we are of opinion that the first captain to the commander in chief, when a member of the court martial according to that act, has a right to take place next the junior rear admiral, and to vote according to that rank.

*Wm. Scott,  
A. Macdonald,  
J. Scott,  
F. C. Cust.*

14th of July 1791.

No. VIII. Cases and Opinion relative to Murders  
cognizable by a Court Martial.

[Referred to page 179.]

Section 7. Sir, *Admiralty-office, 20th of April 1776.*  
H A V I N G communicated to my lords commissioners of the admiralty your letter of the 16th instant, inclosing one from captain Jervis, of the Foudroyant, giving an account that in a fray which happened on the 15th, between John Black and Daniel Brady, two seamen belonging to that ship, the latter received an unfortunate blow from the former, under which and from the want of proper care, owing to the transactions not being made known to any of the officers, he languished till half past five the next morning and then died; and desiring to know whether the prisoner should be delivered up to the magistrates of the county

county of Cornwall, or be tried at a court martial—I am commanded by their lordships, to signify their directions to you, to cause him to be delivered up to the civil magistrate to be dealt with according to law, upon proper application being made to you for that purpose.

I am, &c.

PHILIP STEPHENS.

*To Vice Admiral Amherst.*

Sir,

*Admiralty-office, 21st of February 1783.*

Section 2.

I have communicated to my lords commissioners of the Admiralty your letter of yesterday's date, informing them that Richard Davis, acting midshipman of the *Euridice*, having *stabbed* John Liddel Palmer, another midshipman on board the said ship, on Sunday night last, of which wounds the latter died, you had, on the coroner's application, ordered the body of the deceased to be carried on shore to Gosport, where an inquest was taken, and a verdict of wilful murder found against Richard Davis, whom you directed to be delivered up to the civil magistrate, to take his trial for the murder; and in return, I am commanded by their lordships to acquaint you, that this being a case cognizable by a court martial, more especially as the wounds were given and the deceased died on board the ship, you ought not to have subjected the body to the coroner's inquest, or to have delivered up Davis to the civil magistrate.

I am, &c.

PHILIP STEPHENS.

*Admiral Sir Thomas Pye.*

*Admiralty-Office, 11th of  
January 1783.*

SIR,

Section 3.

I have communicated to my lords commissioners of the admiralty your letter of the 6th instant, returning Captain de Courcy's letter, relative to the man killed by Lieutenant Osmond of the Swallow sloop, and in return thereto, I am commanded by their lordships, to inclose for your perusal a letter which they have received from Mr. Bedford the coroner, upon the subject, together with the opinion of the attorney general thereupon, and to signify their directions to you, to cause the above-mentioned lieutenant to be delivered up to the civil magistrates, to the end that he may take his trial, at the next gaol delivery for the county, accordingly, taking particular care that the persons named in the coroner's above-mentioned letter, be not suffered to go to sea, but kept in readiness to attend the said trial.

I am, &c.

PHILIP STEPHENS.

*Admiral Sir Thomas Pye.*

Section 4.

*Abstract of Lieutenant Osmond's Case.*

On the 29th of December 1782, Lieutenant Osmond stabbed Richard Tucker, a seaman belonging to the Venus bomb vessel, as he was coming alongside the Swallow. The wounded man was sent to Haslar hospital, and died there two days afterwards. On the first of January following the coroner's inquest sat on the body, and the jury brought in a verdict of wilful murder against Lieutenant Osmond.

Section 5.

*The Attorney General's Opinion.*

I presume the wound was given in a place not within the limits of any county, but be that as it may, still this  
+6  
unfortunate

unfortunate man ought to be delivered up to the civil power, in order to be tried at the next gaol delivery for the county in which Richard Tucker died; for, by the statute 2 Geo. II. c. 21, "When a person shall be feloniously stricken upon the sea and shall die of the stroke in England, the offender may be indicted in the county where the death shall happen." I do not see what a court martial has to do with the business, it is for the county gaol delivery, or an admiralty sessions.

L. KENYON.

*January the 9th 1783.*

No. IX. Letter to the Secretary of the Admiralty, and Cafe relative to trying by Courts Martial Officers and men in Ordinary.

[Referred to, p. 183.]

*Dorsetshire, Portsmouth Harbour,  
August the 12th 1765.*

SIR,

WE the underwritten captains of his Majesty's ships at Portsmouth, who were to have composed a court martial for the trial of Alexander Cockburne, having, previous to the trial, taken into consideration the order from their lordships, that, from the nature of this present case, being that of a warrant officer of the Centaur, a ship in ordinary, we entertain great doubts whether, as the ships in ordinary are under the immediate direction of the commissioners of the dock-yard, and have never been generally esteemed to be liable to martial law, nor to the directions of the military officers, we, when assembled as a court, shall have jurisdiction over the prisoner; we make it therefore our humble request, that their lordships will be pleased, if they approve

Section 1.

prove thereof, to direct the opinion of the king's civilians to be taken on the full circumstances of the case, for our guidance on the present occasion,

We are, &c.

(Signed)  $\left\{ \begin{array}{ll} R. Hughes, & Wm. Bennet, \\ J. Montagu, & P. T. Percival, \\ R. Hughes, Jun. & Wm. Campbell, \\ W. Hobham, & John Luttrell. \end{array} \right.$

Thomas Corbett, Esq.

N. B. Dr. Harris, advocate of the admiralty, in his opinion on the above cases, had not a doubt of the competency of a court martial to try any person belonging to his Majesty's ships in ordinary, for offences committed by them against the articles of war.

Section 2: *Letter from the Secretary of the Admiralty, relative to the competency of trying persons belonging to ships in ordinary.*

SIR,

I am favoured with yours of the 4th instant, in regard to courts martial having cognizance of crimes committed by persons belonging to the ships in ordinary.

As the act of parliament expressly extends to persons (without exemption) *in actual service and full pay*, and as persons belonging to ships in ordinary are undoubtedly under both these circumstances, courts martial appear to be fully impowered thereby to take cognizance of crimes committed by such persons.

But as the precedent of this jurisdiction having been exercised, must undoubtedly be more satisfactory than any opinion of mine on this matter; I shall therefore only add, that some time between the two last wars, I attended a court martial at Chatham, where two or three warrant officers of ships in ordinary at Woolwich were ordered to be tried by the admiralty, and they were tried accordingly.

I am, &c.

THOMAS CORBETT.

No. X.



No. X. Papers relative to the trying of Mates or  
Seamen belonging to Navy Transports.

[Referred to p. 184.

*Navy-Office, 19th of July 1791.*

SIR,

COMMISSIONER Fanshaw having transmitted us the  
inclosed depositions, (No. 1 to 14.) concerning the  
men named in the margin, who are now in custody on  
board the Cambridge, being concerned in embezzling  
some stores from the Plymouth transport, and recommended  
that they should be tried for the said offence by a court  
martial; we desire that you will be pleased to lay the same  
before the right honourable the lords commissioners of the  
admiralty, and acquaint their lordships, that having some  
doubts concerning the propriety of trying them by a court-  
martial, we applied to our solicitor for his opinion thereon,  
a copy of whose answer is also inclosed, and you will please  
to move their lordships to give such directions thereon, as  
they shall think proper.

Section 1.

J. Crabb,  
mate,  
Arthur Gif-  
fard, James  
Wilson, P.  
Lindgren,  
George  
Chapander,  
belonging  
to the Ply-  
mouth trans-  
port.

We are, Sir,

Your very humble servants,

(Signed) { Henry Martin,  
J. Henslow,  
Geo. Marsh,  
L. Cras.

*Philip Stephens, Esq. &c.*

*Great*

*Great Marlborough-street,  
19th of July 1791.*

GENTLEMEN,

Section 2.

In obedience to your directions, signified to me in your letter of 13th instant (inclosing several depositions and other papers relative to some stores being embezzled by the mate and part of the crew of the Plymouth transport), that I should give you my opinion, whether, as the said transport is borne on the ordinary of the yard, and not considered as one in commission, the embezzlement above mentioned is a proper case for the investigation of a court martial, I take the liberty to acquaint you, that the embezzlement in question having been committed on board a ship belonging to his Majesty, by persons in his service and pay, I humbly apprehend they may be legally tried by a court martial, and that it is a case proper for the investigation of such a court.

Herewith I return the several papers, which you were pleased to send me on the subject.

I am, with great respect,

Your Honor's most humble,

And most obedient servant,

(Signed) JAMES DYSON.

*Attested John Margeson.*

Section 3.

*Order for assembling a court martial, by the commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, &c.*

WHEREAS the commissioners of his Majesty's navy have transmitted to us two letters, dated the 9th and 10th of last month, which they have received from Robert Fanshaw, Esq. resident commissioner at Plymouth, the former stating the circumstances of an attempt made by John Crabb, the mate, Arthur Giffard, James Wilson, Peter Lindegren, and George Chapander, seamen, part of the crew of his Majesty's transport the Plymouth, to carry away and to embezzle

embezzle some of her stores; and the latter inclosing copies of several depositions relative to the transaction, and the copy of the report of a survey taken by the officers of his Majesty's yard at that port upon the stores of the said transport, by which there appears a considerable deficiency in the quantity of cordage issued for refitting her, besides the quantity stopt in the boat: And whereas, from the circumstances stated in the said commissioner's letter, and deficiencies specified in the said report, there is ground to apprehend that some part of the stores of the said transport has been clandestinely taken away, and that a quantity of the stores was taken out of the said vessel with intention to be embezzled by the above named persons, belonging to her: And whereas we think fit that they shall be tried for the same by a court martial, we send you herewith the two letters from commissioner Fanshaw above mentioned, together with copies of the depositions marked No. 1 to 14, and the copy of the report of a survey on the stores of the said transport herein referred to, and do hereby require and direct you to assemble a court martial as soon as conveniently may be, which court (you being president) is hereby required and directed to try the said John Crabb, Arthur Giffard, James Wilson, Peter Lindegren, and George Chapander, for the offences with which they are respectively charged in the said letters and papers accordingly. Given under our hands, the 27th August, 1791.

(Signed) { Chatham,  
A. Gardener,  
C. Pybus.

*To John Macbride, Esq. captain of his Majesty's ship the Cumberland, and second officer in the command of his Majesty's ships and vessels at Plymouth.*

By command of their Lordships,

(Signed) PHILIP STEPHENS.

*At*

Section 4. *At a court martial assembled and held on board his Majesty's ship Cambridge, in Hamaze, this 31st August 1791.*

John Macbride, esq. president; Sir James Wallace, knight, John Ford, John Colpoys, Thomas Mackenzie, Henry Harvey, Charles Chamberlayne, Charles Mörice Pole, John Thomas Duckworth, Honorable John Rodney, Thomas Hicks, John Samuel Smith, Sir Thomas Byard, knight.

PURSUANT to an order from the right honourable the lords commissioners for executing the office of lord high admiral of Great Britain and Ireland, addressed to John Macbride, esquire, captain of his Majesty's ship Cumberland, and second officer in command of his Majesty's ships and vessels at Plymouth, directing him to assemble a court martial, to try John Crabb, mate, Arthur Giffard, James Wilton, Peter Lindegren, and George Chapander, seamen, belonging to his Majesty's transport the Plymouth, for embezzlement of the king's stores: and the court having maturely and deliberately considered the same; is of opinion, that the prisoners, John Crabb, mate, Arthur Giffard, James Wilton, Peter Lindegren, and George Chapander, seamen, are not persons subject to naval discipline.

Signed by all the Members.

By command of the court,

G. M. RAYLAND,

appointed to officiate as deputy judge advocate.

*The following is a copy of a Letter from Mr. Secretary Stephens, of the Admiralty, to Sir Richard Bickerton, baronet, Commander in Chief of his Majesty's ships and vessels at Plymouth, dated 8th Sept. 1791.*

SIR,

HAVING communicated to my lords commissioners of the admiralty your letter of the 31st *ultimo*, transmitting the result of the meeting of the captains who assembled that morning on board the Cambridge, to hold a court martial, to try the mate and seamen belonging to the navy transport, by which it appears that they are of opinion, that the prisoners above mentioned are not subject to naval discipline; I am commanded by their lordships to send you herewith, for the information of the Captains, a copy of a letter from Mr. Dyson (assistant to the council for the affairs of the admiralty and navy) to the navy board, acquainting them that the embezzlement with which the prisoners are charged, is, in his opinion, proper for the investigation of a court martial, having been committed on board a ship belonging to his Majesty, by seamen in his Majesty's service and pay; which opinion (the transport being borne, and the officers and men paid in like manner as those of other ships in the ordinary) their lordships conceive to be grounded upon one given by Doctor Harris, advocate of the admiralty, in the year 1765 \*, in consequence of a complaint exhibited by lieutenant Tait of one of his Majesty's ships in commission, against Alexander Cockburn, a gunner of a ship in ordinary, that he had not a doubt of the competency of a court martial to try any person belonging to his Majesty's ships in ordinary, for offences committed by them against the articles of war.

I am, &c.

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\* Vide the case alluded to, Appendix, No. IX. Section 1.

Section 6. *The following is a copy of a letter from Captain Macbride to Sir Richard Bickerton, baronet, &c. &c. &c. dated September 1791, viz.*

SIR,

IN consequence of your letter of the 10th instant, I have convened the captains (who remain at this port) that composed the court martial upon the mate and four seamen belonging to the Plymouth transport, and have communicated Mr. Dyson's opinion thereupon; notwithstanding which we remain unanimous in our former decision, for the following reasons; we consider *actual service and full pay*, as expressed in the article of war, to apply only to officers and men actually belonging to one of his Majesty's ships or vessels of war, under a flag or pendant.

The crews of navy transports enter, and it seems they have always been discharged upon requiring it, and discharge themselves at pleasure, and in many instances of an armament, have left the transports and ordinary, and entered on board of his Majesty's ships of war, and received his Majesty's bounty: had they been subject to naval discipline, they were liable to be tried for desertion, and the captain who entertained them liable to be tried by a court martial for having so done.

And though we are of opinion, that the warrant officers and men belonging to his Majesty's ships of war in ordinary should be subject to naval discipline, yet, when we consider them immediately under the navy board, and their officers, who say they are not subject to naval discipline, we lament the line is not more strongly marked between ships in commission and those in ordinary.

With every sentiment of deference and respect to their lordships, we humbly entreat their lordships will be pleased  
to

to lay these our doubts and reasons before his Majesty's judges, for their opinion and our guidance in future.

I am, &c.

### CASE.

SHIPS of war laid up in port are called ships in ordinary, being inserted in the *ordinary list* of the navy, and the warrant officers, &c. appointed to take care of them are paid quarterly, in like manner as artificers and labourers in the king's dock yards. Navy transports, (which are also in the same list) are employed in carrying stores, &c. from one dock yard to another, and their officers and people (who are appointed by the navy board) are likewise paid in the same manner; and which transports, as well as ships of war in ordinary, are under the immediate direction and controul of the navy board. But ships of war in commission come under the denomination of *extraordinaries* (on account of the uncertainty in the expence attending them) and are under the immediate orders of the lords of the admiralty. Section 7.

22 George II. c. 33. sect. 2. enacts, "That for the regulating and better government of *his Majesty's navies* ships of war, and forces by sea, the articles and orders ~~thereinafter~~ following, as well in time of peace as in time of war, shall be duly observed and put into execution, in manner ~~thereinafter~~ mentioned;" the 24th of which articles is in the following words, viz.

"There shall be no wasteful expence of any powder, shot, ammunition, or other stores, in the fleet, nor any embezzlement thereof, but the stores and provisions shall be carefully preserved, upon pain of such punishment to be inflicted upon the offenders, abettors, buyers and receivers (*being persons subject to naval discipline*) as shall be by a court martial found just in that behalf."

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Sect. 4.

SECT. 4. provides, "That nothing in the said act shall extend to empower any court martial to proceed to the punishment or trial of any of the offences specified in the several articles, &c. which shall not be committed upon the main sea, and which shall not be committed by such persons as at the time of the offence committed, shall be in actual service and full pay in the fleet or ships of war of his Majesty, his heirs or successors."

*The foregoing case is laid before his Majesty's advocate, attorney, and solicitor general, and the advocate and counsel for the admiralty, for their opinion.*

#### QUERY.

WHETHER the officers and crews of the navy transports of the description before mentioned, may, or may not be legally tried by a court martial, for breach of any of the articles of war, specified in 22 George II. c. 33. and particularly for the offence of embezzling his Majesty's stores, on board of or belonging to such transports?

#### OPINION.

Attending to the answers which have been given by the navy board to the question annexed; we are of opinion, that the officers and crews of navy transports of the above description, cannot be legally tried by a court martial.

Signed { *William Scott,*  
*A. P. Macdonald,*  
*J. Scott,*  
*W. Battine.*

9th December 1791.

*Quarries,*



*Queries, by counsel, respecting the crews of ships in ordinary and navy transports, with the answers of the navy board, referred to in the opinion of the crown lawyers.* Section 3.

## I.

Q. HOW and by what authority are the different officers of ships in ordinary and navy transports respectively appointed, and what are the different ranks or stations of such officers on board each?

A. The standing warrant officer in ships in ordinary, viz. boatswains, gunners, carpenters, and purfers, are appointed by the admiralty; and the cooks by the navy board; and the mates of the transports are recommended by the master, and appointed by the master-attendant of the dock yard, with the approbation of the board, or the commissioner resident at the port.

## II.

Q. How and with whom, and upon what terms do the seamen belonging to the ships in ordinary and navy transports respectively contract or engage themselves? and how are they severally paid, distinguished from the mode of paying off ships in commission?

A. They make their application to be entered to the master-attendant at the port, who approves and certifies the same to the commissioners, and if it likewise meets his approbation, he signs it, which is an authority to the clerk of the cheque to enter him; there is no contract, but the custom and pay are well known; they are paid their wages quarterly, on the yard books, when the workmen belonging to the dock yard are paid.

## III.

Q. Are the articles of war stuck up or read in ships in ordinary or navy transports, or either of them; pursuant to 22 George II. c. 33. or in any other manner observed on board those different ships?

A. They are not.

## IV.

Q. If a seaman belonging to a ship in ordinary or navy transport chuses to leave it, in order to go into the merchant's service, would he be entitled to his discharge as well in *time of war* as peace? how or by whom is such discharge given, and is there any instance of such a man's being refused his discharge?

A. They are regularly discharged in time of war or peace, on their application.

## V.

Q. Is there any instance of a man belonging to a navy transport being tried by a court martial? and in what manner have persons belonging to such vessels been usually tried for offences committed on board?

A. Not any that we know of.—In cases of misbehaviour they are discharged; and if guilty of theft, have been prosecuted either at the quarter sessions or the assizes,

No. XI. Case relative to the legality of holding a Court Martial at any Place where there are three Post Captains, but one of these commanding a Sloop, and Judge Bathurst's Opinion thereon.

[Referred to page 216.]

#### CASE.

By the act of the 22 George II. a court martial cannot be held at any place where there are less than three officers of the degree and denomination of post captain, or of a superior rank; can therefore a court martial be legally assembled at any place, where there are only two ships of post, a sloop commanded by a post captain, and two other sloops?

#### OPINION.

In the case put, if there are three post captains present, the one of these commanding a sloop only, I think a court martial may be regularly appointed. The sixth article of the general printed Instructions, under the head of Rank and Command, directs, "That commanders of five ships &c. though they may have commanded ships of post before, shall be commanded by junior captains; of post while they keep company together either in port or at sea, but without prejudice to their seniority afterwards."

But though this article deprives them of their *seniority* for the time, it does not expressly deprive them of the *rank and degree of post captain* even for that time; the question then is, whether a post captain commanding a sloop, is to be considered as the junior post captain, or as a master and commander. If the former, he must sit as a

member of every court martial that shall be held at the place where he may be; but if the latter, he can only be called upon when there are not less than three, nor yet so many as five officers of a superior degree.

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No. XII. Case relative to the Court Martial held on Captain Norris, accused by his Officers of bad Conduct in the Engagement off Toulon, February 1744, the Proceedings of which were censured by the House of Commons.

[Referred to p. 218, 228.]

SOON after the engagement off Toulon (February 1744) Captain Norris having resigned the command of the *Essex*, on account of ill health, had intended returning to England; but learning how much his character was aspersed by his officers, he applied to Vice-Admiral Rowley (then commanding officer), for a court martial, to enquire into his conduct on the day of action.

As Captain Norris had resigned his command, the vice admiral did not conceive he had power to order a court martial to be assembled, without orders from the Admiralty.

Captain Norris made application to the Admiralty, and a commission was granted for Vice Admiral Rowley's assembling a court martial, to enquire into the conduct of Captain Norris; and upon the 28th January 1745, a court martial was accordingly assembled, at Mahon, on board of the *Torbay*, composed of the following members:

William

William Rowley, esquire, vice admiral, &c. president.

## CAPTAINS.

J. Gascoigne,	R. Hughes,
H. Osborne,	Hon. Geo. Murray,
Jo. Lingen,	Will. Dilk,
C. Drummond,	Thos. Pye,
Thos. Fox,	Jn. Lovett,
Cha. Watfone,	Ja. Hodfall,
Tho. Cooper,	R. Watkins,
Hon. Geo. Townshend,	M. De L'Angle,
Ed. Strange,	Jn. Watkins,
Matt. Mitchell,	G. R. Vanburgh,
Robt. Pett,	Jn. Wilfon,
C. W. Purvis,	Hon. Wm. Farmer,
Robert Maynard.	

Lieutenant Edward Jekyl, second lieutenant of the *Essex*, was the accuser of Captain Norris; the court wished that the accuser should be sworn, but this he refused; and the court, after proceeding several days in examining witnesses, a motion was made and seconded on the 5th of February, whether the court had a right, or ought to come to any determination on the matter before them, as Captain Norris was not then in his Majesty's service or on full pay. The court therefore came to the resolution to transmit the whole minutes of their proceedings, on this enquiry, to the lords commissioners of the Admiralty. Lieutenant Jekyl represented to the secretary of the Admiralty the treatment he had received from the court, and Lieutenant Palliser, Gower, and Peyton, the other lieutenants of the *Essex*, wrote to the Admiralty on the same subject; these papers were laid before the house of commons, who animadverted on the proceedings, and censured them, as *partial, arbitrary, and illegal*.

Captain Norris was included, with other captains and officers accused of bad conduct, in the vote of the house of commons requesting his Majesty to give directions to try them; but Captain Norris, when at Gibraltar, on his way home to England, retired into Spain, changed his name, and remained for ever in obscurity.

No. XIII. Case of Lieutenant Frye of the Marines, and the Consequences resulting from illegal Proceedings at a Court Martial.\*

[Referred to p. 229, 231, & II. 242.]

IN the year 1743, Lieutenant Frye of the marines, serving on board the *Oxford* man of war, was brought to a court martial, at Port Royal, in Jamaica, by the captain of the ship, for having disobeyed his orders, in refusing to assist another lieutenant in carrying an officer prisoner on board the ship. Lieutenant Frye had persisted to have the captain give the order in writing. The evidence produced against him at the court martial, were the depositions of a parcel of illiterate people, reduced into writing several days before he was brought to trial, which persons were entirely unknown to him, having never to his knowledge seen or heard their names before; and upon his objecting to the evidence, he was brow-beaten, and overruled. On the charge being thus proved, he was sentenced to fifteen years imprisonment, and tendered for ever incapable of serving his Majesty. He was brought home, and his case after being laid before the privy council, appearing in a justifiable light, his late Majesty was graciously pleased to remit the punishment, and to order him to be released.

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Some time after he brought an action in the Court of Commons, against Sir Chaloner Ogle, who had sat as president at the court martial, and had a verdict in his favour for 1000 *l* damages, it having been proved that he had been kept fourteen months in close confinement before he was brought to trial. The judge moreover informed him, that he was at liberty to bring his action against any of the members of the said court martial he could meet with. The subsequent steps of this case are still more remarkable.

Upon application made by Lieutenant Frye, Sir John Willes, lord chief justice of the Common Pleas, issued his writ of *capias* against Rear Admiral Mayne, and Captain Rentone, two of the members who had sat at the above court martial; on the 15th of May 1746, while Admiral Mayne presided, and Captain Rentone sat as member of a court martial, at Deptford, for the trial of Vice Admiral Lestock, they were both arrested, at the breaking-up of the court, in consequence of the above writ.—The arresting of the president highly offended all the members of the court, they met twice on the subject, and resented highly what they deemed an insult, and drew up certain *resolutions*, in which they expressed themselves with some degree of acrimony against the lord chief justice; and the judge advocate was directed to deliver them to the board of Admiralty, in order to their being laid before the king. In these resolutions they demanded “satisfaction for the high insult on their president, from all persons how high soever in office, who have set on foot this arrest, or in any degree advised or promoted it,” and remonstrating that by the said arrest, “the order, discipline, and government of his Majesty’s armies by sea was dissolved, and the statute 13 Charles II. made null and void.”

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The lords of the Admiralty were much displeased at the indignity offered the court, and accordingly laid the resolutions before his Majesty. The duke of Newcastle, by his Majesty's command, wrote to the lords commissioners of the Admiralty, wherein he says, "His Majesty expressed great displeasure at the insult offered to the court martial, by which the military discipline of the navy is so much affected; and the king highly disapproves of the behaviour of Lieut. Frye on the occasion. His Majesty has it under consideration what steps may be adviseable to be taken on this occasion."

From the sequel it will appear that the lords commissioners of the Admiralty, as well as the secretary of State, were not aware of the very great authority of the lord chief justice of Common Pleas; who, as soon as he heard of the resolutions of the court martial, caused each individual member to be taken into custody, and was proceeding in legal measures to assert and maintain the authority of his office, when a stop was put to the process by the following submission (signed by the president, and all the members of the court \*) being transmitted to lord chief justice Willes.

"As nothing is more becoming a gentleman, than to acknowledge himself to be in the wrong, so soon as he is sensible he is so, and to make satisfaction to any person he has injured; we, therefore, whose names are under-

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\* Signed by Perry Mayne, esq. rear admiral of the Blue, president; Honorable John Byng, rear admiral of the Blue.

#### CAPTAINS.

Honorable Ed Legge,  
James Rentone,  
Charles Coleby,  
Joseph Hamer,  
Smith Calis,  
John Pitman,  
Thos. Hanway,

Jn. Orme,  
Thos. Frankland,  
Honorable Jn. Hamilton,  
Sir Chas. Molloy,  
Robert Erskine,  
Chas. Catford,  
Edw. Spragge.

"written,



“written, being thoroughly convinced that we were entirely mistaken in the opinion we had conceived of lord Chief Justice Willes, think ourselves obliged in honour, as well as justice, to make him satisfaction as far as it is in our power. And, as the injury we did him was of a public nature, we do, in this public manner, declare, that we are now satisfied the reflections cast upon him in our resolutions of the 16th and 21st of May last, were unjust, unwarrantable, and without any foundation whatsoever; and we do ask pardon of his lordship, and of the Court of Common Pleas, for the indignity offered both to him and the court.”

This paper was dated the 10th of November 1746, was received in the Court of Common Pleas on the 14th, and ordered to be registered in the Remembrance Office—a memorial, as the lord chief justice then observed, “*to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken.*” The letter from the court martial, together with Judge Willes’s acceptance, were inserted in the Gazette of the 15th November 1746.

No. XIV. Queries, and Judge Bathurst’s Opinion relating to the Duties of a Judge Advocate, and assembling Naval Courts Martial.

[Referred to p. 235, 240. & II. 16.]

QUERY I. What is properly the office of a judge advocate; the act of the 22 Geo. II. says, he is to swear the court and the evidence, and the general printed Instructions, under the heads of Courts Martial, direct him to take minutes of the proceedings of the court, to advise them

them of the proper forms, and to deliver his opinion on any doubts or difficulties that may arise in the course of the trial ; but I should be glad to know, whether he is prosecutor for the crown, and, if so, whether he can with propriety advise the prisoner and assist him in his defence ?

*Answers to the above Query by Judge Bathurst.*

The answers to these queries suppose the fact contained in them to be accurately stated, as well as the clauses of the different acts of parliament which are alluded to.

The duty of a judge advocate can only be collected from the statutes which relate to naval courts martial, and the constant practice since the first of these ; which is supposed to be the 13th of Charles II. It is undoubtedly his duty that the proof, both on the part of the crown and the prisoner, should be properly laid before the court ; and where the point is doubtful, he should incline on the part of the prisoner.

Query II. By the act of parliament of the 22d George II. a court martial is authorized, in the absence of the judge advocate of the fleet and his deputy, to appoint a person to execute the office of judge advocate ; but as it cannot properly become a court martial, till the members are sworn but by a judge advocate, how and when is such person to be appointed ?

It appears highly reasonable that he should be appointed some time before the court assembles, as there ought to be some time to give the prisoner notice of his trial, to summon the evidence, &c. which are supposed to be part of the judge advocate's duty ; has not the president therefore authority, as soon as he receives an order to assemble a court martial, to grant a warrant to some person to execute the office, if not objected to by the majority of the members, will of course become the officiating judge advocate agreeably

agreeably to the act; and can it be a legal court martial, if the person officiating as judge advocate be appointed by warrant from the commander in chief of the Squadron instead of the president?

*Answer to the second Query.*

I think that the court martial, as soon as it is assembled, may appoint a judge advocate; and as the act says it must be done by the court, a majority should concur in the appointment. It might not be improper, however, to have this further explained by a new act.

No. XV. Case and Opinion of the King's Advocate General, and the Solicitor of the Admiralty, with regard to a Judge Advocate's Proceedings at a Court Martial.

[Referred to Vol. I. p. 239, 240, 273, 281, 283. & II. p. 199.]

I. A COURT martial is intended to be soon held for enquiring into the conduct of several officers, in the late naval engagement off Toulon, in February 1744; and charges have been prepared by the prosecutors in behalf of the crown, against the several officers who are to be tried: Should such charges be laid before the court by the judge advocate?—Should he examine the witnesses upon such points as may occur to him to be proper or necessary at the trials, as well in support of the charges, as in behalf of the persons charged; and, in the deliberations or debates of the court, ought he to offer his sentiments and opinion, if he should judge the same proper or requisite for the information of the court? and ought he not to offer and lay before the court, whatever he judges may tend to their information?

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The charge intended to be laid before the court martial ought to be produced by the judge advocate. He may examine the witnesses upon such points as may occur to him to be proper or necessary to be considered at the trial, as well in support of the charge, as on behalf of the persons accused. In the deliberation and debates he must offer his sentiments and opinion, if required, or if he observed any error in point of law, he ought to offer his judgment on the point for the information of the court; and he ought to lay before the court every matter or thing that may conduce to a regular decision of the points in question.

II. Part of a judge advocate's duty at a court martial, is to take minutes of all the proceedings thereat; which minutes are to be attested by the judge advocate, and are the only authentic account of the court's proceedings:

Ought not the court to be so deliberate in their proceedings, as to allow sufficient time for the judge advocate to take his minutes of the whole proceedings with exactness? but if the court should scruple to do so, and not allow sufficient time in their proceedings for that purpose: how in such cases ought the judge advocate to act?

A court martial ought to allow a sufficient time, for the judge advocate to take proper minutes of the entire proceedings with exactness. And the minutes taken should be read to the court, and be approved by them. We are of opinion, that the court cannot in point of justice deny sufficient time for the taking proper minutes of the proceedings.

III. It is customary for the judge advocate to take preparatory affidavits from the witnesses in support of the charge, against a person to be tried at a court martial.

Is it fitting or proper such affidavits should be communicated to the officer appointed to assemble or preside at the court martial, or to any other officer who may be summoned as a member of the court, till the same are properly laid in a judicial way before the court martial?

It may be proper for the judge advocate to communicate to the president of the court martial, the affidavit taken by virtue of his office; but not to the several other members that compose the court, before the court shall be regularly assembled.

IV. It has been the general practice at courts martial for the president to put the interrogatories to the witnesses; in case a president should decline to put an interrogatory desired by any member of a court-martial, and not suffer it to be put; What method in such case is fitting and proper to be taken? and is it a necessary form that the president should put all interrogatories to the witnesses?

The president is certainly a proper person to put the interrogatories to the witnesses. If he should decline or refuse to put a question proposed by an inferior member, then it ought to be determined by a majority of votes, whether that question should be put or not; if the majority agree that the question is proper, then the president ought to put and propose it to the witnesses.

V. When courts martial proceed to a determination upon matters before them, if the members are not unanimous therein, the sentences are drawn up agreeable to the sentiments and judgment of the major part of them, and such sentences have usually (if not constantly) been signed by all the members, as well those who agreed thereto, as those who did not; Is it necessary, and why, that members of a court martial, who do not concur with the majority

in their determination, should nevertheless sign the sentence drawn up agreeable to such determination?

The sentences in courts martial receive their force and validity from the judgment of the majority; that all the members present ought to sign such sentences, although they differ in opinion.

VI. If a court martial consisting of any number of members whatsoever, adjourns from time to time as may be found necessary, and during such adjournments the number of members who first composed the court are unavoidably reduced by sickness or death, or otherwise; May not such of them as remain from time to time meet according to adjournment, and go on with the examination into, and determination of the matters before the court? Would the addition of new members be proper? and would it in that case be esteemed a continuation of the same court?

If the number of a court martial be reduced by sickness, death, or any other accident, the remaining members may meet, and act at the several adjournments. The addition of new members will not be proper, unless such persons should hear or be well informed of the evidence given before their attendance.

VII. Is it fitting or proper that copies of the affidavits in support of a charge against a person to be tried at a court martial, should be delivered to the accused person, previous to his trial?

It is in no case proper, that copies of the affidavits in support of a charge against a person to be tried at a court martial, should be delivered or shewn to the person accused, previous to his trial.

*Doctors' Commons,  
Sept. the 6th 1745.*

G. PAUL,  
W. STRAHAN.

No. XVI.

No. XVI. Vote of the Honourable House of Commons to enquire into the conduct of Admiral Mathews, &c. &c. and that Commissioners might be appointed to collect the Evidence; together with a Case stated, and Opinion respecting the deferring passing sentence on Capt. Burrish, until the Court had gone through the whole Evidence against the Admiral.

[Referred to, p. 265.]

*Vote of the Honourable House of Commons, 11th April 1745. Section 1.*

RESOLVED,

THAT an humble address be presented to his Majesty, that he will be graciously pleased to give directions, that courts martial may be held in the most speedy and solemn manner, to enquire into the conduct of Admiral Mathews, Vice Admiral Lestock, Captain Burrish, Capt. Richard Norris, Captain Williams, Captain Ambrose, Captain Frogmore, Captain Dilk, in and relating to the late engagement between his Majesty's fleet, and the combined fleets of France and Spain off Toulon, and of the lieutenants of his Majesty's ship the Dorsetshire then on board, and of all other officers who are or shall be charged with any misconduct in that action, and to try them for the same; and that his Majesty would be pleased to appoint a proper person or persons to collect all the evidence necessary for the trials of the said several commanders and officers, and to prosecute them effectually; in order to bring those to condign punishment through whose misconduct it shall be found that such discredit has been brought upon his Majesty's arms, the honour of the nation sacrificed, and

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such an opportunity lost of doing the most important service to the common cause.

21st April  
1745.

The house of commons pursuant to the foregoing vote, addressed the king, that his Majesty would be pleased to give directions that courts martial may be held in the most speedy and solemn manner, to enquire into the conduct of Admiral Mathews, Vice Admiral Lestock, Captain Burdett, Captain Richard Norris, Captain Williams, Captain Ambrose, Captain Frogmore, Captain Dilk, in and relating to the late engagement between his Majesty's fleet, and the combined fleets of France and Spain, off Toulon, and of the lieutenants of the Dorsetshire then on board, and of all other officers who are or shall be charged with any misconduct in that action, and to try them for the same; and that his Majesty would be pleased to appoint a proper person or persons to collect all the evidences necessary for the trials of the said several commanders and officers, and to prosecute them effectually, in order to, &c. &c. &c.

April 20.

The Duke of Newcastle transmitted the said address to the lords of the admiralty, and signified his Majesty's pleasure that their lordships should comply with what was desired thereby.

In pursuance of his Majesty's pleasure so signified, the lords of the admiralty appointed Mr. Sharpe and Mr. Crespigny to collect all the evidences necessary for the trial of the said officers, and to prosecute them effectually; and those two gentlemen were accordingly employed in preparing the charges, and collecting the evidences, against such of the named officers as were in England, and also against some others since charged with misconduct in the said action. And the lords of the admiralty, by letter dated the 11th of September last, directed Sir Chaloner Ogle to assemble a court martial on board his Majesty's ship



London, at Chatham, upon the 23d of the same month, and to proceed to enquire into the conduct of Admiral Mathews, Vice Admiral Lestock, Captain Burrish, &c. relating to the late engagement between his Majesty's fleet and the combined fleets of France and Spain, off Toulon, and to try them for the same, upon such charges as the prosecutors for the crown had prepared against them; and in the trials of the said officers, Sir Chaloner Ogle was directed to begin first with the lieutenants, then go on with the captains, and lastly with the flag officers.

A court martial was accordingly assembled by Sir Chaloner Ogle, the lieutenants were accordingly first tried, and sentence of acquittal was pronounced; the court then proceeded to the trial of Captain Burrish, and heard the evidence of all the witnesses produced by the prosecutors for the crown in support of the charge against him, and also of all those produced by himself in his behalf.

And it being then observed, that the tenor of the oath taken by each member is "*Well and truly to try and determine the matter before them, between the king and the prisoner to be tried;*" and some of the members of the court being of opinion, that they could not comply with the tenor of that oath, without hearing all the evidence to be given at any of the trials, in relation to the said engagement; since after so hearing the whole evidence, the conduct of each particular officer to be tried, may appear to the court in a different light, from what it may appear in, when only one part of the evidence has been heard; and therefore the same members were further of opinion that if the consideration of the evidence already given relating to Captain Burrish's conduct, and the passing sentence thereupon, were to be deferred till they had gone through the whole evidence that may be given, relating to all the officers accused of misconduct in the same engagement, the doing so

may enable the court more truly to determine upon Captain Burrish's conduct therein, and consequently to do strict justice between the king and the prisoner.

Section 2.

Query. Can the court legally defer passing sentence upon Captain Burrish, till they had gone through the whole evidence relating to all the accused officers; and if they can, and should so defer it, can they consider the evidence given at the ensuing trials as in any manner affecting Captain Burrish, and admit the same to have any weight in the forming their judgment and sentence upon his conduct?

Answer. We have considered this question, and are of opinion that there is no law which prohibits a court martial from giving time to give a sentence; but we apprehend it to be most proper, and most agreeable to practice, to give a sentence upon trial for a capital offence, before the court proceeds to any other trial, for offences of the like nature.

And we are very clearly of opinion, that they cannot consider the evidence given at any ensuing or preceding trial, as in any manner affecting Captain Burrish, and that they cannot by law admit such evidence to have any weight in forming their judgment, and giving sentence upon him.

G. PAUL,  
W. STRAHAN,  
G. LEE.

*Doctors' Commons,*  
*Oct. 4th, 1745.*

No. XVII. Particulars relative to the Articles of Charges exhibited against the Officers, accused of not having done their Duty in the Engagement off Toulon, and the Purport of their separate Sentences of the Court Martial, assembled Sept. and Oct. 1745, and May and June 1746.

[Referred to p. 266, 272.]

IN consequence of an address from the house of commons \*, his Majesty issued orders to the board of admiralty, for the trial of such officers as were accused of not doing their duty in the engagement off Toulon, and the lords of the Admiralty accordingly directed Sir Chaloner Ogle, knight, admiral of the Blue Squadron, to assemble a court martial on board his Majesty's ship London, at Chatham, to try them upon the charges prepared against them by the prosecutors for the crown; and in the trials of the officers therein named, Sir Chaloner Ogle was directed to begin first with the lieutenants, then go on with the captains, and lastly with the flag officers.

The court assembled on the 23d of September 1745, and was composed of the following members, viz.

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\* Appendix, No. XVI. Section 1.

Sir Chaloner Ogle, knight, admiral of the Blue, president.  
 Perry Mayne, esquire, rear admiral of the Blue.

William Smith, esquire, commodore.

#### CAPTAINS.

William Parry,	Francis Geary,
Charles Wyndham,	Smith Callis,
William Chambers,	George Bridges Rodney,
James Rentone,	Robert Erskine,
Robert Allan,	John Pitman,
Thomas Frankland,	Edward Spragge,
Sir William Hewitt, bart.	Robert Swanton,
Charles Coleby,	Hon. Archibald Stuart,
Sheldrake Layton,	George Elliot,
Joseph Hamer,	John Orme,
Charles Molloy, knt.	

The first persons brought to trial were Messrs. Henry Page, Charles Davids, William Griffiths, and Cornelius Smelt, being the four lieutenants of the Dorsetshire. They were accused of having advised their captain, George Burrish, esq. not to bear down upon the enemy. Of this charge they were all acquitted.

On the 25th of September the court proceeded to the trial of Captain George Burrish of the Dorsetshire. There were five articles laid to his charge, which were to the following purport, viz. 1. For not engaging within point blank, withdrawing from the fight, and not keeping his proper station in the line, 2. For not bearing down and engaging in his proper station, notwithstanding the admiral sent two several orders so to do; in reply to which orders, the captain pleaded that he had no powder filled, although a battle had been expected for several days preceding. 3. For expending his ammunition to no manner of purpose, when he was not within point blank distance of the enemy,

enemy, contrary to his instructions and his duty. 4. For not affording assistance, and going to the relief of the Marlborough (though the next ship to her, and capable of so doing) agreeable to his instructions, and to two several orders sent him by Admiral Mathews. 5. For not covering and conducting the fireship, when she blew up without doing any execution, notwithstanding her deceased Captain hailed him, and requested assistance from him. The court after having heard witnesses for the prosecution and the prisoner, on the ninth of October pronounced the following sentence: "That by reason of captain Burrish lying inactive for half an hour, when he might have assisted the Marlborough, and not being in a line with the admiral, when he first brought to, he is guilty of part of the charge exhibited against him, as he did not do his utmost to burn, sink, or destroy the enemy, nor give the proper assistance to the Marlborough till after the message he received from the admiral; that he is guilty of the 12th and 13th articles of the Fighting Instructions, and that therefore the court adjudge him to be cashiered, and for ever rendered incapable of being an officer in his Majesty's navy."

On the 10th of October, the court proceeded to the trial of Captain Edmund Williams, of the Royal Oak. The charges against him amounted to four, the purport of which were: 1. That he did not bear down and engage the enemy, but kept back from the fight to windward of his station in the line. 2. That he expended his ammunition to no manner of purpose, by firing at the enemy when not within point blank distance, or even at random shot distance. 3. That he neglected giving assistance to the Namur and Marlborough, then hard pressed by the enemy, when he had it in his power so to do. 4. Disobedience to the admiral's signals.

The court found that captain Williams failed in his duty, by not being in a line with the admiral, and by keeping to windward of the line during the greatest part of the action, and not within a proper distance to engage with any effect, during the most part of the time he was engaged; but in regard to his long services, and his eyesight being very defective, and other favourable considerations, the court were unanimously of opinion that all this greatly weighed in mitigation of the punishment due, and therefore only adjudged him as unfit to be employed any more at sea; but recommended him to the lords commissioners of the admiralty, to be continued on the half-pay list, according to his seniority. This their lordships complied with, and Captain Williams was afterwards appointed a superannuated rear admiral in 1747.

On the 18th of October, the court proceeded to the trial of Captain John Ambrose, of the *Rupert*. The charges against him were nearly the same as those exhibited against Captain Williams, with the additional one, of his neglecting to cover and protect the *Ann* galey, fireship, when bearing down to burn the *Real*. The court found that he had failed in his duty, in not engaging closer than he did, when he had it in his power: but, in regard that both before and since the action, he had borne the character of a vigilant officer, and that his failure in the action seemed to have arisen from a mistake in judgment; the court only sentenced him to be cashiered during his Majesty's pleasure, and mulcted him of one year's pay, for the use of the chest at Chatham; his Majesty, however, was pleased to restore him to his rank; and, in 1747, he was put on the superannuated list, as a rear admiral.

Captain Dilk of the *Chichester* was next tried, for not bearing down and engaging the enemy closer, when he had it in his power so to do. The court found the charge proved,

proved, and, by their sentence, he was dismissed from the command of the *Chichester*. But his Majesty was afterwards pleased to restore him to his rank, and to place him on the half-pay list.

Captain Frogmore of the *Boyne* was among the number of accused captains; but died before he returned to England.

Captain Norris of the *Essex* was likewise among the number accused, but the particulars of his trial at Mahon, after having resigned the command of his ship, and of his having afterwards retired into Spain, has been already mentioned.\*

Captains Robert Pett, George Sclater, Temple West, Thomas Cooper, and James Lloyd, were severally accused of misconduct by Vice Admiral Lestock, and tried by a court martial on the several charges exhibited against them; the evidence in support of which had been previously collected by John Sharpe and Philip Crespigny esquires.

Captains Pett and Sclater were acquitted; but Captains West, Cooper, and Lloyd, were by the sentence of the court cashiered. The sentence was deemed extremely hard, and reprobated as severe and bearing no proportion to the faults proved against them. Many palliating circumstances had appeared in their favour, and from the general testimony of their characters as good officers and seamen, his Majesty was pleased to restore them to their former rank in the service.

On the 6th of May 1746, the court assembled on board of his Majesty's ship the *prince of Orange*, at Deptford, for the trial of Vice Admiral Lestock. Sir Chaloner Ogle could not attend through illness. The court was composed of the following members:

Perry Mayne, esq. rear admiral of the *Blue*, president,  
Honourable John Byng, rear admiral of the *Blue*.

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\* Appendix, No. XII.

## CAPTAINS.

Hon. Edward Legge,	John Orme,
James Rentone,	Thomas Frankland,
Charles Coleby,	Hon. John Hamilton,
Joseph Hamer,	Sir Charles Molloy,
Smith Callis,	Robert Erskine,
John Pitman,	Charles Catford,
Thomas Hanway,	Edw. Spragge.

This trial took up the whole of the month of May ; a very great number of witnesses having been examined for and against Mr. Lestock. On the 3d of June the deputy judge advocate read the sentence of the court, which was, " The court were of opinion, that the information the charge was founded upon was not true, and that the evidence in support of the charge was not sufficient to make it good ; and that many witnesses in support of the charge, as likewise those in the admiral's defence, had refuted the whole ; therefore the court unanimously acquitted Vice Admiral Lestock of the whole and every part of the charge."

On the 16th of June, the trial of Admiral Matthews commenced. This court martial was composed of the following members :

Perry Mayne, esq. rear admiral of the Red, president.  
The Hon. John Byng, rear admiral of the Blue.

## CAPTAINS.

Miles Stapleton,	Sir Charles Molloy, senior,
Hon. Edw. Legge,	Smith Callis,
James Rentone,	John Pitman,
Thomas Frankland,	Charles Catford,
Sir William Hewitt,	Thomas Hanway,
Charles Coleby,	George Elliot,
Hon. J. Hamilton,	Edward Spragge,
Sheldrake Laton,	and
Joseph Hamer,	John Orme.

Vice



Vice Admiral Lestock exhibited no less than fifteen charges against him; the purport of which was, That through his misconduct, the miscarriage of his Majesty's fleet in the Mediterranean was principally owing. Many witnesses were examined; and, after several adjournments, the Court, on the 22d of October, passed the following sentence, *viz.*

“ The Court having examined the witnesses produced, as well in support of the charge as in behalf of the prisoner, and having thoroughly considered their evidence, do unanimously resolve, that it appears thereby, that Thomas Matthews, esq. by divers breaches of duty, was a principal cause of the miscarriage of his Majesty's fleet in the Mediterranean, in the month of February 1744, and that he falls under the 14th article of an act of the 13 Charles II. for establishing articles and orders for the regulating the better government of his Majesty's navies, ships of war, and forces by sea; and the Court do unanimously think fit to adjudge the said Thomas Matthews to be cashiered, and rendered incapable of any employ, in his Majesty's service.”

No. XVIII. Letter from the Secretary of the Admiralty, in answer to a Letter from the Judge Advocate, upon Admiral Matthews objecting against different Captains being admitted to sit as Members on his Trial. [Referred to p. 162.]

Sir,

*Admiralty Office, 17th June 1746.*

I HAVE laid your letter of yesterday's date before my Lords Commissioners of the Admiralty, inclosing a letter from Admiral Matthews, delivered by him yesterday to the Court Martial, at Deptford, wherein he objects against Captain Legge, Captain Rentone, and Captain Hamilton, being admitted to sit as judges or members of that Court, for enquiring into the conduct of himself and others in the late action in the Mediterranean, between his Majesty's fleet and the combined fleets of France and Spain, off Toulon, with the reasons upon which his said objection is founded; and you having signified, that the Court Martial desire their lordships determination thereupon, and the validity of the said case of objection, their lordships command me in the first place, to take notice of the difference between your letter, and that of the two prosecutors, who, in their letter of the same date, say, "That the Court looking upon that objection of no avail, had proceeded to read the charge against Admiral Matthews after the said objection;" which is in effect over-ruling it.

But lest any doubt should still remain upon the minds of any of the members of the Court, their lordships think proper to enter into a more particular discussion of the reasons alleged by the admiral, for his objection; which are,

1<sup>st</sup>. That by an ancient and established usage, such captains only have been admitted to sit at Courts Martial, whose  
whole

whose ships were then within the districts and limits of the command of the flag officer, or commander in chief, who presided at such Court Martial.

2d. That the three captains objected against are now commanders of ships that are out of the district or limits of the said commander.

In answer to which their lordships direct you to inform the Court, that the act of parliament of the 13 Charles II. which is the foundation of martial law, and for trying offences committed at sea, mentions no such restrictions, and says only, that Courts Martial shall consist of commanders and captains.

In foreign parts indeed Courts Martial do generally consist of flag officers, and captains of ships then under the command of the president, which usage is the case of necessity; but here at home, captains of ships have often been called from other ports to the port where the Court Martial is held; indeed, almost always when the trial has been upon officers of distinction, or the trial has been upon any matters of importance; some instances of which go here inclosed.

As to his second objection, that the said captains are not in the actual command of their respective ships, but that the said ships are commanded by other commanders appointed for that purpose; their lordships direct you to inform the Court, that the case of those three captains is the same as of those captains who appear (by the instances inclosed) to have repaired from distant places to the port where the Court Martial has been assembled, the command of their ships being left in other hands during their absence. That, in peace and in port, it has been commonly judged sufficient to entrust the command of ships to the first lieutenants, during the absence of the captain; but in the present circumstances of affairs, their lordships thought it not proper

proper for his Majesty's service, to suffer those ships to be idle in port, because of the absence of their captains at a Court Martial, but to depute others to officiate for them by order only, which is so far from divelling their proper captains from their real command, that one of the officiating captains is only a master and commander, and will not take post, notwithstanding he now acts in the command of a ship of sixty guns.

As to the admiral's questions, desiring to be informed by the Court, before they proceeded on his trial, who is his accuser, and by whom the charge against him was drawn and prepared; their lordships command me to send you the inclosed copy of an address from the house of commons, dated 11th April 1745, which whoever has read, cannot but be much surprized at the question, especially from a member of the house of commons.

I am, &c.

T. CORBETT.

No. XIX. Case laid before the King's Civilian at the Admiralty, whether a Captain who is ill, his Presence may be dispensed with, and the Proceedings go on; with Dr. Harris's Opinion relating thereto. [Referred to p. 273, 274-

Sir,

*Cornwall, Hamoaze, 27th October 1765.*

**B**E pleased to acquaint their lordships, that in obedience to their order of the 10th instant, directing the captains of his Majesty's ships and vessels at Plymouth, next in command to Captain Lloyd, of the *Fame*, to assemble a Court Martial for the trial of William Skane, a deserter  
from

from his Majesty's sloop Fame, transmitted to me by Lord Edgecombe; I made the signal for assembling a Court Martial on board his Majesty's ship under my command, on Saturday the 26th instant, but found it impossible to form a court for proceeding to trial, from the following reasons, viz. "There being nine of his Majesty's ships in commission at this port, none of whose captains are absent upon leave, and the act directing no court martial, held by virtue of the said act, shall consist of more than thirteen or less than five persons, to be composed of such flag officers, captains or commanders, then and there present, as are next in seniority to the officer who presides at the court martial." Five captains only did assemble of the ships then and there in commission, so that three were absent, ill health preventing their attendance. It was doubted whether the act does allow, to dispense on any account whatsoever with the absence of any of the captains or commanders then and there present, as are next in seniority to the officer who presides at the court martial, according to the words of the said act; I therefore beg you will be pleased to signify this difficulty to their lordships, that opinion may be had whether the said act does allow of the absence of any such captains; and if it does allow of any such absence, under what circumstances, and the proofs that are necessary to justify the legal proceedings of a court. I have communicated this difficulty to Lord Edgecombe, who has directed me to apply to their lordships; and as I myself differ in opinion from captains \*\*\*\* who are the gentlemen who raised this difficulty, I shall continue to make the signal and give my attendance from day to day, until the absent senior captains are able to attend, or I receive their lordships' directions, by which their lordships will see that I am no way deficient in my duty.

I am, &c.

GEO. MACKENZIE.

*Opinion of Dr. Harris on the foregoing case, respecting the legality of assembling a court martial when any of the officers next in seniority to the president are unable to attend through ill health.*

It appears to have been the intention of the legislator by the act of the 22 George II. that every court martial should be composed, if possible, of senior officers; but though the words of the statute are, "That no court martial shall consist of more than thirteen, or less than five persons, to be composed of such officers as are next in seniority to the officer who presides;" they can never, I think, be understood to mean, that the next in seniority to the president, who happens to be present on the same station with their ships, should attend in order, at all events, and notwithstanding any impediment whatever, or otherwise, that no legal court can be held; for such a construction seems not only unreasonable, as well as detrimental to his Majesty's service, by rendering it extremely difficult to make a court, but also to be very contrary to the general tenor of other parts of the act, which appears to be calculated to expedite justice as much as possible, by permitting five captains to constitute a court, and even by allowing commanders to assist, when a sufficient number of post captains are not to be found.

And as I observe every court martial has an express power, by the 15th section of the statute, to dispense with the presence of any member, and suffer him to go on shore (in case of illness); even after a trial is begun, there seems to be no reason to doubt, but that any officer may be excused from attendance, by the president and court, if a just reason is assigned before a trial is begun; and that they may afterwards proceed to business, if the remaining number of qualified officers is sufficient to constitute a court martial;

martial; I therefore apprehend, that Mr. Mackenzie, and the five other captains, may legally assemble, and proceed as a court, to try William Skane, if it is taken down in the minutes, that the absent and senior officers have certified the president by letter, or otherwise, of their inability to attend through ill health.

(Signed)

G. HARRIS.

*Dofors Commons, 4th Nov. 1775.*

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No. XX. Letter from Admiral Sir Thomas Pye, to the Admiralty, stating his having recommended to the Court Martial on Captain Bromedge, to dispense with the Attendance of Rear Admiral Edwards and Captain Balfour, two of its Members, viz. [Referred to p. 274.

Sir,

*Arrogant, Spithead, 25th May 1780.*

I AM to acquaint you, for the information of my lords commissioners of the Admiralty, that the wind being favourable for Rear Admiral Edwards to proceed to Newfoundland, and Captain Balfour, of the Culloden, to the West Indies, agreeable to the orders they are under, and they being members of the court martial which has been sitting several days past on Captain Bromedge, late commander of the Buffalo, and is not likely to be finished for some days; and being of opinion, the court has power to dispense with their attendance, by the late act of parliament, which says, "No members of the court martial to absent themselves from the trial, except in case of sickness, or other extraordinary or indispensable occasion, to be

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" judged

“judged by the court.” I mean that the public service may not suffer by their attendance on this duty, to recommend to the members of the court martial, when they assemble to-morrow morning, to dispense with the attendance of the said rear admiral and captain, as there will be eleven members still remaining to pass sentence, that the king’s service may not suffer by their being prevented proceeding to their respective destinations.

I am, &c.

T. PYE.

*Philip Stephens, Esq.*

*N. B.* Though the Admiralty approved of the above letter, the members of the court were of opinion, they had not power to determine upon the above application, for dispensing with the attendance of Rear Admiral Edwards and Captain Balfour.

No. XXI. Letter to the Admiralty, on the Non-attendance of a Captain. [Referred to Vol. II. p. 21.

*Prince of Wales, Portsmouth Harbour, 29th Jan. 1780.*

WE the undersigned captains of his Majesty’s ships and vessels at Portsmouth and Spithead, having attended on board his Majesty’s ship the Prince of Wales, in obedience to a signal made for that purpose, in order to proceed to form a court martial, desire to represent to you, that upon the court’s going to be sworn in, the inclosed letter was received from Captain Hamilton, commander of his Majesty’s ship the Champion, representing that he was prevented from attending the court by a severe cold and sore throat; his surgeon attended, but refused to attest  
 †6  
 upon



upon oath, that Captain Hamilton's attending the court would endanger his health, on which the surgeon was sent after him, but found he was gone off to his ship at Spit-head; we therefore do not think ourselves authorized to form the court, on account of the absence of Captain Hamilton.

We are, &c.

(Signed) {	<i>John Moutray,</i>	<i>John Macartney,</i>
	<i>Philip Affleck,</i>	<i>Ant. Hunt,</i>
	<i>Fra. Reynolds,</i>	<i>St. John Chinnery,</i>
	<i>Benj. Caldwell,</i>	<i>Hen. Collins,</i>
	<i>Longford,</i>	<i>Cha. M. Pcke.</i>

*To Philip Stephens, Esq.*

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XXII. Case and Opinion of the King's Advocate, Attorney General, and Solicitor General, relative to the Judge Advocate's asking Questions of Witnesses when under Examination.

[Referred to p. 281.

Sir, *Admiralty Office, 18th of November 1747.*

I AM commanded by the lords commissioners of the admiralty, to send you inclosed an attested copy of the opinion of his Majesty's advocate general, solicitor general, and attorney general, in relation to the judge advocate's asking questions of witnesses at a court martial.

I am, &c.

THOMAS CORBETT.

*Mr. Atkins, Deputy Judge Advocate.*

18 Geo. II. *An Act for the further regulating, and better government of his Majesty's navies, ships of war, and forces by sea, and for regulating the proceedings upon courts martial in the sea service—It is among other things enacted as follows, viz*

THAT from and after the first day of June 1743, it shall and may be lawful to and for the said lord high admiral, or the commissioners for executing the office of lord high admiral for the time being; and they are hereby authorized and impowered to grant commissions to any flag officers, commanders in chief of squadrons of ships, or captains of his Majesty's ships, to call and assemble courts martial, consisting of flag officers and captains, to enquire and try any person or persons whatsoever, for any offences or crimes against the present act, or for any other offences or crimes which are cognizable at any such court martial, by virtue of any other law now in being; and that at all such courts martial, to be held to enquire and try any person, for any such offence or crime which shall be committed after the commencement of this act, *the judge advocate of the fleet, or the person appointed to act for him for the time being, shall and may, and he and they are respectively authorized and required to collect the evidence in support of the charge against the person charged, and to inform the court, and prosecute in his Majesty's name; and for that purpose it shall and may be lawful to and for the said judge advocate, or such person so appointed to act for him as aforesaid, and he and they are hereby respectively authorized and required, by writing under his or their hands, to summon all and every such person or persons, as he or they respectively shall be informed, or have reasons to believe can give any material evidence in support of the said charge, to appear and be examined as a witness or witnesses before any such court martial.*

Whether

Whether in consequence of the direction contained in the foregoing extract in the words that are interlined,

Query, Is it the duty of the judge advocate, and has he thereby a right to ask the witnesses, when under examination upon a trial, such questions as shall appear to him fitting and proper?

As the judge advocate is by the act appointed and obliged to prosecute on behalf of the crown, and, by his having before collected the evidence, must be able to judge what questions are proper to put to the witnesses; we are of opinion he has a right to ask them all proper and fit questions.

(A true copy.)

*Thomas Corbett,*

17th Nov. 1747.

G. PAUL.

D. RYDER.

W. MURRAY.

### No. XXIII. Application for Courts Martial.

[Referred to Vol. II. p. 8.]

Sir, *Russel, Portsmouth Harbour, March 29, 1779.* Section 1.

**I** BEG leave to acquaint you, that this day James Taylor, steward to the purser of his Majesty's ship under my command, and James Webster, seaman, belonging to the said ship, have been detected in carrying on shore, and selling several articles of sloop cloathing belonging to government, in charge of the purser of the said ship.

I request you will be pleased to apply to the right honourable the lords commissioners of the admiralty, for an order for a court martial to be held on the said James Taylor and James Webster for the said offence.

I am, &c.

FRA. S. DRAKE.

*Vice Admiral Evans.*

Section 2.

Sir,

*Hydra, Spithead, Sept. 2, 1771.*

I beg leave to inform you, that Thomas Geary, a marine belonging to his Majesty's ship under my command, was confined on the 23d of July 1779, for wilfully and maliciously firing at Oliver Veale, serjeant of marines, belonging to the said ship, on that night, when on duty, to the endangering of his life, the ball having passed through his jacket: In consequence of which, I am to request you will apply for a court martial to be held on the said Thomas Geary for the said crime.

I am, &amp;c.

LLOYD.

*Admiral Sir Thomas Pye.*

No. XXIV. Admiralty and Commander in Chief's  
Orders to assemble a Court Martial.

[Referred to Vol. II. p. 11, 12. 22.]

*By the Commissioners, &c. &c.*

Section 1.

**W**HEREAS Sir Thomas Pye, admiral of the White, and commander in chief of his Majesty's ships and vessels at Portsmouth and Spithead, hath transmitted to us a letter of the second of September last, from captain Thomas Lloyd, late commander of his Majesty's ship *Hydra*, requesting that Thomas Geary, a marine belonging to that ship, might be tried by a court martial, for wilfully and maliciously firing at the serjeant belonging to her, on the night of the 23d of June preceding, when on duty, to the endangering of his life, the ball having passed through his jacket: And whereas we think fit the said captain Lloyd's

Lloyd's request should be complied with\*, we send you herewith his abovementioned letter, and do hereby require and direct you forthwith to assemble a court martial for the trial of the said Thomas Geary, for the offence with which he therein stands charged, and to try him for the same accordingly.

Given under our hands the 3d of November, 1779.

(Signed) { SANDWICH,  
R. MAN.  
BAMBER GASCOYNE.

*To Captain Thomas Burnett,  
commander of his Majesty's  
ship Prudent, and senior  
captain of his Majesty's ships  
and vessels at Portsmouth,  
and Spithead.*

\* *The form of an order for assembling a court martial. Section 2.  
abroad by a commander in chief is similar.*

The form of an order, where it is necessary for a senior officer or commander in chief abroad to preside, runs thus in the last clause, or the clause of the order may be worded thus, "By virtue of an act of parliament, passed in the  
" 22d year of the reign of his Majesty king George II.  
" intituled, An act for amending and explaining, and re-  
" ducing into one act of parliament, the laws relating to  
" the government of his Majesty's ships and vessels and  
" forces by sea, empowering the senior officer of any five  
" or more of his Majesty's ships which shall happen to  
" meet in foreign parts to hold courts martial, and preside  
" thereat, I do hereby assemble a court martial, composed  
" of the captains and commanders of the Squadron under  
" my command, for the trial of T. G. for the offences  
" with which he stands charged in captain L.'s letter to

" me herewith produced for the reference of the court,  
 " and to try him for the same accordingly.

" Given, &c."

*To, &c.*

No. XXV. Judge Advocate's Warrant.

[Referred to Vol. II. p. 16. 22.]

*By Admiral Sir Thomas Pye, &c. &c.*

**WHEREAS** the right honourable the lords commissioners of the admiralty have directed me, by an order dated the 11th instant, to assemble a court martial, and try Captain William Williams, of his Majesty's ship the Active, for leaving his station at Newfoundland without orders; and whereas by an act passed in the twenty-second year of the reign of king George the Second, intituled, "An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea," it is ordered, "that in the absence of the judge advocate, and his deputy, the court martial shall have full power and authority to appoint any person to execute the office of judge advocate."

I do, with the consent and approbation of the members who constitute this court, hereby authorize and appoint you to execute the office of judge advocate on the above occasion. For which this shall be your warrant.

Given on board his Majesty's ship Prince George,  
 (where the court is assembled) in Portsmouth  
 Harbour, December 22, 1777.

T. PYE.

*To Thomas Binslead, Esq.  
 hereby appointed to execute  
 the office of judge advocate  
 at the court martial above  
 mentioned.*

## No. XXVI. Provost Marshal's Warrant.

[Referred to Vol. II. p. 16.]

*By John Amherst, Esq. &c. &c. &c.*

THE right honourable the lords commissioners of the admiralty, having ordered a court martial to be assembled to try William Evans, a seaman, belonging to his Majesty's ship the Albion, for desertion: I do hereby authorize and appoint you to officiate as provost marshal on this occasion; and you are to take the person of the said William Evans into your custody, and him safely keep, until he shall be delivered by due course of law; and for so doing this shall be your warrant.

Given, &amp;c.

J. A.

*To Mr. J. Grant, hereby appointed provost marshal on the occasion.*

No. XXVII. Commander in Chief and President's Memorandums or Summonses to Flag Officers and Captains, to attend a Court Martial.

[Referred to Vol. II. p. 16, 17.

*Mem.*

Section 1.

Summonses  
to sit as a  
member.

**Y**OU are to attend a court martial, which is to be assembled by Vice Admiral Evans, on board his Majesty's ship *Warspite*, in Portsmouth Harbour, on Wednesday next, the third instant, at nine o'clock in the morning, in order to sit as member of the same.

Dated, &c.

THOMAS PYE.

*Respective captains, Spithead,  
and Portsmouth Harbour.*

*Royal George, Spithead,*

*Oct. 19, 1790.*

*Mem.*

Section 2.

Members to  
attend a  
court mar-  
tial.

**Y**OU are desired to attend at a court martial, to be assembled by me on board his Majesty's ship, the *Royal William*, on Friday, the second instant, at eight o'clock in the morning, and it is expected you will attend in your uniform frocks.

(Signed) S. BARRINGTON.

*To the respective admirals and  
captains at Spithead.*

*Victory, Spithead,*

*July 16, 1791.*

*Mem.*

Section 3.  
Summonses  
to mem-  
bers.

A Court martial will be held on board his Majesty's ship *Royal William*, on Monday, the 18th instant; the  
signal



signal will be made at eight o'clock, A. M. and the court will meet precisely at nine.

By order of the commander in chief,

H. PARKER.

*To the admirals commanding squadrons, to be by them given in orders to the respective captains.*

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No. XXVIII. Memorandum to the President to assemble Members, and to the Captain of the Ship where the Court is to be assembled.

[Referred to Vol. II. p. 17.]

WHEREAS I have ordered the captains of his Majesty's ships at Spithead, to attend a court martial, at which you are to preside, to be held on board his Majesty's ship —, in Portsmouth Harbour, on Monday next the 18th instant, at nine o'clock in the morning:

Section 1.

President to assemble members.

You are to assemble the same at the time above mentioned, and, as senior captain in Portsmouth Harbour, you are to signify my directions to the respective captains of his Majesty's ships there, that they may attend in like manner.

*To Captain Evans, Invincible.*

*Memorandum from the commander in chief, to the captain of the ship where the court martial is to be assembled.*

Section 2.

*Sandwich, June 15, 1777.*

To make the signal.

THE right honourable the lords commissioners of the admiralty having directed captain —, of his Majesty's ship —, to preside at a court martial, which will be held

held on board his Majesty's ship —, under your command, on Monday next, the 18th instant, at nine o'clock in the morning:

You are hereby required to attend the same, and to cause the signal to be made at the above-mentioned hour.

To Captain —

Section 3.

*General orders for assembling a military court martial.*

A general court martial to assemble at —, on Wednesday, at ten o'clock in the forenoon, to try such prisoners as shall be brought before them.

Lieutenant Colonel A. B. President,  
and fourteen other members.

All evidences to be ordered to attend, and a list of them to be sent to the deputy judge advocate to-morrow morning.

No. XXIX. Judge Advocate's Letters and Summonses to Prisoners, Prosecutor, and Evidence.

[Referred to Vol. II, p. 18.]

Sir,

Portsmouth, August 10, 1779.

Section 1.

Letter to  
prisoners.

THE lords commissioners of the admiralty having ordered Captain Cleland, of the *Arrogant*, to assemble a court martial, to enquire into the loss of his Majesty's storeship, the *Supply*, late under your command, and to try yourself, her officers and men, for their conduct on that occasion; and it being intended that I shall officiate as judge advocate upon the occasion at the said court martial, which is to be held on board the *Arrogant*, in Portsmouth

8†

Harbour,

Harbour, on Thursday next the 12th instant, at nine o'clock in the morning; I send you herewith a copy of the order for the trial on yourself, officers, and company above mentioned, also copies of the papers referred to in the order, and am to desire you will be pleased to transmit me a list of the officers and men late belonging to the Supply, who are new at this port, and of such persons as you may think proper to call to give evidence in your favour, that they may be summoned to attend accordingly.

I am, &c.

*Captain Nasmith, late of his  
Majesty's storeship Supply, &c.*

*Edgar, Torbay, August 27, 1781.*

THE right honourable the lords commissioners of the admiralty having directed a court martial to be held on you for embezzlement of stores, to-morrow morning at nine o'clock, on board his Majesty's ship A. I am to acquaint you therewith, and inclose for your information, Captain G.'s complaint against you.

Section 2.  
Letter to  
prisoners.

You are therefore desired to prepare yourself for the same, and if you have any persons to appear as witnesses in your behalf, you will send me a list of their names, that they may be duly and speedily warned to attend the said court martial.

W. B.

*Deputy Judge Advocate.*

*Mr. A. C. Master of the Valiant.*

Sir,

The lords commissioners of the admiralty having ordered Captain —, to assemble a court martial to try A. B. for desertion from his Majesty's ship under your command,

Section 3.  
Letter to  
prosecutor.

mand, and it being intended that I shall officiate as judge advocate upon the occasion, I am to request you will be pleased to send me a list of the witnesses you chuse to call upon in support of the charge, and to cause the inclosed notice to be delivered to the prisoner, and to permit a list of his witnesses to be sent me with your's and such of either as belong to the ship you command; the president desires you will give them directions to attend the court.

I am, &c.

To Captain ———, of his  
Majesty's ship ———.

Sir,

August 19, 1779.

Section 4.

Letter to  
evidence.

YOU are desired to attend at Portsmouth, to give evidence at a court martial to be held there the 12th instant, for enquiring into the conduct and behaviour of Vice Admiral Sir Hugh Palliser, on the 27th and 28th of July 1778, and to continue such attendance so long as the said court shall think necessary.

I am, &c.

(Signed)

GEO. JACKSON,

Judge Advocate.

Admiral Sir Thomas Pys.

Sir,

Section 5.

Another.

YOU are desired to attend a court martial to be held on board his Majesty's ship ———, to-morrow the 27th instant, at nine o'clock, for the trial of Mr. C. on a charge exhibited against him by Captain G. of his Majesty's Ship V. for embezzlement, in order to give your evidence thereon.

I am, &c.

To Mr. ———

No. XXX.

No. XXX. Letter from a Judge Advocate putting off a Court Martial, on account of the Indisposition of the President. [Referred to Vol. II. p. 19.

Sir,

THE court martial for the trial of —, belonging to his Majesty's ship under your command, being put off till Friday next, the 4th instant, on account of the indisposition of the president—I am directed by him to acquaint you therewith, and to request you will please to cause the inclosed notice to be delivered to the prisoner, and give directions for the witnesses belonging to —, to attend the court on board the —, on Friday next, instead of tomorrow at ten o'clock in the morning.

I am, &c.

To Captain —.



No. XXXI. Form of Minutes.

[Referred to Vol. II. p. 21.

*Minutes of proceedings at a court martial held on board his Majesty's ship the Prudent, at Spithead, on the 8th and 9th days of November 1779.*

PRESENT,

THOMAS Burnett, Esq. commander of his Majesty's ship Prudent, and senior captain of his Majesty's ships and vessels at Portsmouth, president. Section 1.

CAPTAINS.

## CAPTAINS.

Sam. Uvedale,	Mark Robinfon,
Wm. Dickfon,	R. Fanfhaw,
Geo. Montagu,	R. Rodney Bligh,
Wm. Cumming,	Tho. Lenox Frederick,
Edw. Garnier,	Walter Young *.

The prifoner was brought into court, and the evidence and audience admitted.

Read the order of the right hdnourable the lords commissioners of the admiralty, dated the third instant, directed to Captain Thomas Burnett, commander of his Majesty's ship Prudent, and senior captain of his Majesty's ships and vessels at Portsmouth and Spithead, to try Thomas Geary, a marine belonging to his Majesty's ship Hydra, for wilfully and maliciously firing at the ferjeant belonging to her, on the night of the 23d of June last, when on duty, to the endangering of his life, the ball having passed through his jacket.

Then the members of the court and judge advocate, in open court, and before they proceeded to trial, respectively took the oaths directed by act of parliament made and passed in the 22d year of the reign of his late Majesty king George II. entitled, "An act for amending, explaining, " and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, " and forces by sea."

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\* Should any of the captains be absent on leave, or unable to attend through ill health, it must be inserted in the minutes immediately after the names of those present, thus: "being all the captains of the post ships " at —, except Captain —, of his Majesty's ship the —, who is " absent with leave from the lords commissioners of the admiralty and " Captain —, of the —, who certified the president his inability to " attend through ill health."

A letter

A letter from Captain Thomas Lloyd, late commander of the Hydra, to Sir Thomas Pye, admiral of the White, &c. &c. was read as follows; viz.

Sir,                      *Hydra, Spithead, Sept. 2, 1779.*

I BEG leave to inform you, &c. &c. &c.

All the evidences were ordered to withdraw out of court, except Lieutenant Rowley Bulteel, of the Hydra, who was sworn.

Court.

Answer.

Lieutenant Bulteel ordered to withdraw.

Serjeant Oliver Veale was next called into court, and sworn.

Court.

Answer.

The prisoner asked this witness no questions, the latter withdrew.

Lieutenant Bulteel was again called in and interrogated.

Court.

Answer.

The evidence in support of the charge being finished, the prisoner was called upon to make his defence, which he did in the following words, viz.

The serjeant, &c.

The prisoner then desired that his witnesses might be examined.

Bryan Coile, private marine, was accordingly sworn.

Prisoner.

Answer.

The evidence withdrew.

The prisoner requested Captain Lloyd to speak to his character. Captain Lloyd said, "I never heard any com-

"plaint against him from any officer while under my command, except for the offence, with which he stands charged. I never saw him drunk, nor was he ever punished for the offence."

The prisoner having nothing further to offer in his defence, the court was cleared and proceeded to deliberate upon and form the sentence.

The court having carefully and deliberately weighed and considered the evidence produced, and what the prisoner alleged in his defence, were of opinion that the charge had been fully proved \*, and that he fell under the first part of the 22d article, of an act passed in the 22d year of his late Majesty king George II. for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels and forces by sea. In consequence thereof, the court adjudged the prisoner, Thomas Geary, to be hanged by the neck until he is dead, at the yard-arm of such one of his Majesty's ships, and at such time as the lords commissioners of the admiralty shall direct. But in consideration of the good character of the prisoner, and some other favourable circumstances, the court agreed to recommend him as a proper object for mercy.

The court was opened, audience admitted, and sentence passed accordingly.

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\* Peculiarities in the minutes when the charge has been proved, and the punishment only corporal. "1. That the charge has been proved. 2. That the punishment to be inflicted on the prisoner for his offence be corporal. And 3. "That therefore the court adjudges the prisoner to receive 200 lashes on his bare back with a cat-of-nine-tails, alongside of "such of his Majesty's ships and vessels at ———, in such proportions "and at such times as the commander in chief of his Majesty's ships and "vessels at ——— shall direct."



*Minutes of the proceedings of a court martial assembled and held on board his Majesty's ship Blenheim, at St. Helens, the day of February 1783, for the trial of William King, seaman, belonging to his Majesty's ship Goliath, for desertion, viz.* Section 2.

## PRESENT,

John Elliot, esq. commodore and commander of a squadron of his Majesty's ships, president.

## CAPTAINS.

Philip Affleck,

Stair Douglas,

John Brown,

Hon. George Berkeley.

Thomas Lewes,

The prisoner being brought into court, and audience admitted, the order of the right honourable the lords commissioners of the admiralty, dated the third instant, directed to commodore John Elliot, &c. at St. Helens, for the trial of William King, seaman, belonging to his Majesty's ship Goliath, for desertion, was read, the members of the court and judge advocate, then, in open court, and before they proceeded to trial, respectively took the oath enjoined by act of parliament. The letter from Captain Sir Hyde Parker, commander of his Majesty's ship Goliath (containing the charges against the prisoner), was then read, and all the witnesses being ordered to withdraw and attend their examinations separately, they all withdrew accordingly, except the first to be sworn, and the court proceeded to trial as follows :

Evidence in support of the charge, ———, of his Majesty's ship the Goliath, sworn and examined as follows :

Court.

Answer.

The muster-book of his Majesty's ship Goliath, being produced to the court, the prisoner appeared to be run the day of January last.

There being no other witnesses to examine in support of the charge, the prisoner was asked what he had to offer in his defence.—The defence rested here—The court was then cleared, and the judge advocate having read the minutes, and the court having maturely considered the whole, agreed that the charge against the prisoner is proved \*. 2. That the punishment to be inflicted on him for his offence be corporal. And 3. That therefore, the court adjudge the prisoner to receive 200 lashes on his bare back with a cat-of-nine-tails, alongside of such of his Majesty's ships and vessels at St. Helens or Spithead, in such proportions and at such times, as the present commander of a squadron of his Majesty's ships at St. Helens, or the commander in chief of his Majesty's ships and vessels at Portsmouth, shall direct.—The court was then opened, audience admitted, and sentence passed accordingly.

*Section 3. Preamble to the Minutes of a Court Martial appointed by a senior officer meeting with five or more ships abroad.*

[Referred to Vol. II. p. 21.]

AT a court martial held on board his Majesty's ship — in Lisbon River, the — day of —, by virtue of an act of parliament passed in the 22d year of the reign of his Majesty king George the Second, intituled, "An act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea," empowering the senior officer of any five or more of his Majesty's

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\*. Peculiarities of minutes when the charge is not proved.

" That the charge is not proved, and did thereupon adjudge the prisoner to be acquitted, and returned to his proper ship, there to serve in his former station."

ships, which shall happen to meet in foreign parts, to old courts martial and preside thereat.

PRESENT,

John Elliot, esquire, captain of his Majesty's ship Edgar, senior officer and commander of his Majesty's ships and vessels in the river Tagus, president.

CAPTAINS, &c. &c.

No. XXXII. Case and Opinion respecting the Legality of admitting a Prosecutor as an Evidence at a Court Martial. [Referred to Vol. II. p. 57.]

Sir,

*Portsmouth, Jan. 7, 1789.* Section 1.

**C**APTAIN Thomson, commander of his Majesty's ship Edgar, being directed by their lordships to assemble a court martial for the trial of Mr. Charles Thackery, lieutenant of his Majesty's ship Thorn, on several charges represented in a letter from Captain William Taylor, her commander, to you, and amongst others for going into the captain's cabin when alone at sea, and calling him scoundrel and liar, which Captain Taylor can alone prove, and as Captain Thompson apprehends that the court may have a doubt of the propriety of admitting Captain Taylor to give his evidence, because he is complainant, he has directed me to state the case to you, and to request you to move their lordships to lay the same before such counsel as they shall think proper, for an opinion on the following question:

"Whether Captain Taylor's evidence under the above circumstances ought to be admitted or not, and if it ought to be admitted, whether after he has been examined, as is the custom of courts martial to examine the witnesses separately and apart from each other, he can

“ be permitted to remain in the court to conduct the prosecution?”

Captain Thompson means to assemble the court martial on Monday morning next, and hopes to be favoured with an answer before that time.

Sir, I am, &c.

*To Philip Stephens, Esq.*

### O P I N I O N.

Section 2.

THE distinction between the objection to the competency, and objections to the credit of a witness, has been long established, and in criminal prosecutions it is not a legal objection to the competency of a witness or to the admissibility of his evidence, that he is the prosecutor, whatever objections to his credit may arise under the circumstances of the case.

The effect of the evidence when admitted and the mode of conducting the prosecution, must be left to the judgment of the court. If the practice of courts martial in examining witnesses separately is so universal that it cannot be dispensed with in any case; I suppose that some agent or attorney on behalf of the prosecutor may conduct the prosecution, which is every day's practice in courts of law.

If any doubt should be conceived by the judges of the court on the propriety of receiving the evidence of a complainant, it may be proper to observe, that the rule which is universal in civil actions that a plaintiff cannot be admitted as a witness in his own cause, does not apply to criminal prosecutions, which are always supposed to be at the suit of the crown, and on behalf of the public; and therefore, objections from interest, or for want of other evidence or circumstances to confirm the testimony of a single witness, are objections only to the credit.

*Lincoln's Inn, January 10,*  
1789.

F. C. CUST.

No. XXXIII. Opinion of the Attorney and Solicitor  
Generals, and the Honourable Heneage Legge,  
respecting the Number of Witnesses to be exa-  
mined at Courts Martial: Dated April 25, 1746.

[Referred to Vol. II. p. 124.]

**I**N answer to the question in the letter transmitted to us,  
we think the court should not refuse any witnesses, that  
are now ready to be examined, if the prosecutors insist  
they are material.

But as we are of opinion, it is in the power of the  
court to limit a certain time for concluding the examina-  
tions, what time that should be, must depend upon all the  
circumstances, of which the court can only be the judge.

And we think the prosecutors should be very careful not  
to call too many to the same facts, which can only tend  
unnecessarily to protract the trials, and finally to elude the  
justice of them,

D. RYDER.

W. MURRAY.

HENEAGE LEGGE.

#### No. XXXIV. Forms of various Sentences.

*Sentence of a court martial on Admiral Byng, and letter, re- Section 1.  
commending him to mercy.*

[Referred to Vol. II. p. 211.]

**A**T a court martial assembled on board his Majesty's  
ship Prince George, in Portsmouth harbour, upon  
the 27th of December 1756, and held every day after-  
wards (Sundays excepted,) till the 27th of January 1757,  
inclusive.

## PRESENT,

Vice Admiral Smith, president.

Rear Admiral Holbourn,

Rear Admiral Norris,

Rear Admiral Brodrick,

## CAPTAINS.

Holmes, Douglas,

Gerry, Bentley,

Boys, Keppel,

Moore, Dennis.

Sturges,

The court, pursuant to an order from the lords commissioners of the Admiralty to Vice Admiral Smith, dated 14th December 1756, proceeded to enquire into the conduct of the Honourable John Byng, admiral of the Blue Squadron of his Majesty's fleet, and to try him upon a charge, that, during the engagement between his Majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw, or keep back, and did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his Majesty's ships as were engaged in the action with the French ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve St. Philip's Castle, in his Majesty's island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his Majesty's command; and having heard the evidence, and prisoner's defence, and very maturely and thoroughly considered the same, they are unanimously of opinion, that he did not do his utmost to retrieve St. Philip's Castle, and also, that during the engagement between his Majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did not do his utmost to take, seize, and destroy the ships of the

the French king, which it was his duty to have engaged; and to assist such of his Majesty's ships as were engaged in fight with the French ships, which it was his duty to have assisted; and do therefore unanimously agree, that he falls under part of the 12th article of an act of parliament of the 22d year of his present Majesty, for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea; and as that article positively prescribes death without any alternative left to the discretion of the court; under any variation of circumstances, the court do therefore unanimously adjudge the said Admiral John Byng to be shot to death, at such time and on board such ship as the lords commissioners shall direct.

But as it appears by the evidence of Lord Robert Bertie, Captain Gardener, and other officers of the ship, who were near the person of the admiral, that they did not perceive any backwardness in him during the action, or any mark of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the court do not believe that his misconduct arose either from cowardice or disaffection, and do therefore unanimously think it their duty most earnestly to recommend him as a proper object of mercy.

Signed by all the Members  
composing the Court.

*To the Right Honourable the Lords Commissioners of the Admiralty.*      Section 2.

[Referred to Vol. II. p. 211.]

WE the underwritten, the president and members of the court martial, assembled for the trial of Admiral Byng, believe it unnecessary to inform your lordships, that in the whole

whole course of this long trial, we have done our utmost endeavour to come at truths, and to do the strictest justice to our country and the prisoner; but we cannot help laying the distresses of our minds before your lordships on this occasion, in finding ourselves under a necessity of condemning a man to death, from the great severity of the 12th article of war, part of which he falls under, and which admits of no mitigation, even if it should be committed by an error in judgment only, and therefore for our consciences sake, as well as in justice to the prisoner, we pray your lordships, in the most earnest manner, to recommend him to his Majesty's clemency.

We are, &c.

Signed by all the Members of the  
Court Martial,

*St. George, Portsmouth Harbour,*

*27th January 1757.*

Section 3. *Sentence of a court martial on twenty seamen belonging to his Majesty's ship Narcissus, for mutiny and sedition; six of whom were ordered for execution, two corporally punished; and the others acquitted.* [Referred to p. 266.

At a court martial assembled on board his Majesty's ship Assurance, in the North River, New York, the 18th, and held by several adjournments, the 20th, 21st, 22d, 23d, 24th, and 25th days of May 1782.

PRESENT,

Captain Elliot Salter, president.

CAPTAINS.

R. Biggs,

Jn. Bazely,

Chr. Mason,

Wm. Swiney,

David Graves,

Matthew Squires.

The court (being duly sworn according to act of parliament), in pursuance of an order from Robert Digby, esquire,



esquire, rear admiral of the Red, and commander in chief of his Majesty's ships and vessels in North America, directed to Elliot Salter, esquire, captain of his Majesty's ship *Santa Margarita*, proceeded to the separate trials of Hamilton Wood, Thomas Crandon, Josiah Marshall, Robert Wisely, and Francis Rae, belonging to his Majesty's ship *Narcissus*, for making several mutinous assemblies, and uttering words of sedition and mutiny, and endeavouring to persuade the ship's company to rise on captain Edwards and his officers, and dispossess them of their command and authority in the *Narcissus*, and to carry her into some rebel port; also Owen Cooper, Thomas Splitman, John Simpson, James Bryan, Thomas Hogan, Peter Delaney, James Young, Thomas Gallachan, David Brett, Jonathan Major, Lucas Cabbanne, John Jewel, Daniel Obrien, Anthony Mosses, and Morris Bryan, for being present at the said mutinous assemblies, and concealing traiterous designs; and having heard read the charge exhibited against them, in a letter from captain Edwards, of his Majesty's said ship *Narcissus*, to Rear Admiral Digby, as well as the evidence in support of the said charge, and also what the prisoners had to offer in their own defence respectively; and having maturely and deliberately considered the whole and every part thereof with the most minute attention; the court is of opinion, That the charge is fully proved against the said Hamilton Wood, Thomas Crandon, Josiah Marshall, Francis Rae, Owen Cooper, and Thomas Splitman; that it is in part proved against Robert Wisely and Peter Delaney, and that it is not proved against John Simpson, James Bryan, Thomas Hogan, James Young, Thomas Gallachan, David Brett, Jonathan Major, Lucas Cabbanne, John Jewel, Daniel Obrien, Anthony Mosses, and Morris Bryan; the court doth therefore adjudge the following punishment, viz. The said Hamilton Wood, Thomas Crandon,

Crandon, Josiah Marshall, Francis Rae, Owen Cooper, and Thomas Splitman, to be hanged by the necks until they are dead, at the yard-arms of his Majesty's said ship *Narcissus*; and at such time as the commander in chief of his Majesty's ships and vessels at the port shall direct, and the body of the said Hamilton Wood to be afterwards hung in chains, in the most conspicuous place the commander in chief shall think proper to direct. That Robert Wisely shall receive 500 lashes, and Peter Delaney shall receive 200 lashes with a cat-of-nine-tails on their bare backs, alongside of such ships, and at such times, in such proportions, as the commander in chief shall think proper; and they are hereby sentenced to suffer accordingly. And the court doth acquit John Simpson, James Bryan, Thomas Hogan, James Young, Thomas Gallachan, David Brett, Jonathah Major, Lucas Cabbanne, John Jewel, Daniel Obrien, Anthony Mosses, and Morris Bryan, and they are hereby acquitted accordingly.

Signed by the court.

*John M<sup>r</sup> Arthur,*

*Appointed by the court to execute the office*

*of Judge Advocate on the occasion.*

Section 4. *Sentence of death on Mr. Benjamin Lee, master's mate of the Mariborough.*

At a court martial assembled on board his Majesty's ship *Battleur*, in Port Royal harbour, Jamaica, on Friday the 7th of March, 1783.

PRESENT,

The Right Honourable Samuel Lord Hood, rear admiral of the Blue, &c. &c. president.

CAPTAINS, &c.

The court being duly sworn, in pursuance of an order from Joshua Rowley, esquire, rear admiral of the Red, and

and commander in chief of his Majesty's ships, and vessels employed and to be employed at and about Jamaica, and dated the 3d day of March 1783, and directed to the Right Honourable Samuel Lord Hood, rear admiral of the Blue, &c, proceeded to try Mr. Benjamin Lee, master's mate of his Majesty's ship Marlborough, for behaving in a riotous manner, and insulting Lieutenant Tristram Hillman, fourth lieutenant of the said ship, on the night of the 2d of March 1783, when in the execution of his office; and having heard the evidence on the part of the prosecution, and that of the prisoner, and very seriously and maturely considered the same, are of opinion, that the charge against the prisoner is fully proved. The court do therefore adjudge the said Mr. Benjamin Lee to be hanged by the neck until he is dead, at the yard-arm of such of his Majesty's ships, and at such time as shall be directed by the commander in chief of his Majesty's ships and vessels at this port, and the said Mr. Benjamin Lee is hereby sentenced to be hanged by the neck until he is dead accordingly.

Signed by the court.

*A. B. appointed by the court to execute the office of Judge Advocate on the occasion.*

*Sentence on a seaman for abusing the second lieutenant of a ship, also ordering two seamen, who were examined as witnesses, to be imprisoned for prevarication.* Section 5.

[Referred to Vol. II. p. 141.]

At a court martial held, &c.

The court, in pursuance of an order from the right honourable the lords commissioners of the Admiralty, dated the 3d of May 1783, and directed to Captain ——— of his Majesty's ship ——— and senior officer next to Captain ——— of his Majesty's ships and vessels at Plymouth,

Plymouth, proceeded to try William Owen, a seaman belonging to his Majesty's ship Albion, for having abused, in the grossest and most offensive terms, Sir George Home, second lieutenant of that ship, and for having quitted the yaul, to which he belonged, without the permission of the coxswain, and not returning to him on his commanding him so to do, and having heard the witnesses, produced on the part of the crown, in support of the charge, and what the prisoner had to alledge in his defence, and having maturely and deliberately weighed and considered the whole, the court is of opinion, that the charges have been proved against the prisoner; and doth, from the circumstances of the case, adjudge him to receive 50 lashes on his bare back with a cat-of-nine-tails, on board the said ship Albion, at such time, and in such manner, as the commanding officer of the said ship Albion for the time being shall appoint; and the said William Owen is hereby ordered to be punished accordingly.

And it appearing to the court that A. B. and C. D. two seamen belonging to his Majesty's ship E, who were produced as witnesses, and sworn, and examined on the said trial, did, in the course of their several examinations, prevaricate in this evidence; the court doth order them severally to be imprisoned in the Marshalsea, for the term of three months.

Signed by the court.

Section 6. *Sentence of a court martial on a midshipman, wherein he is reprimanded for having been disorderly when a prisoner at large, and which was the grounds of an action against the captain.* [Referred to Vol. II. p. 159.

At a court martial held, &c.

THE court in pursuance of an order, &c. proceeded to the trial of Thomas Crawford, belonging to his Majesty's ship

ship the Emerald, for having behaved to Captain Kniell of the said ship with contempt, disobeyed his orders, and acted in a quarrelsome, disorderly manner. And having strictly examined the evidence in support of the charge, as well as heard what the prisoner had to offer in his defence, and very maturely considered the whole, the court is of opinion, that the charge is proved in part, *he having been disorderly when a prisoner at large*; but in consideration of his long confinement, they do only adjudge the said Thomas Crawford to be reprimanded, and he is hereby reprimanded accordingly.

Signed by the court.

*Sentence of a Court Martial on Admiral Keppel.*

Section 7.

At a court martial assembled on board his Majesty's ship Britannia, in Portsmouth harbour, the 7th January 1779, and held by adjournment at the house of the governor of his Majesty's garrison at Portsmouth, every day afterwards (Sundays excepted), till the 11th February 1779, inclusive.

PRESENT,

Sir Thomas Pye, admiral of the White, president.

Matthew Buckle, esquire, vice admiral of the Red, till the close of the sixth day, when he became unable to continue his attendance on account of sickness.

John Montagu, esquire, vice admiral of the Red.

Marriot Arbuthnot, esq. } rear admirals of the White.  
Robert Roddam, esq. }

CAPTAINS.

M. Milbank,

Taylor Penny,

Wm. Bennet,

Ph. Bowler,

F. S. Drake,

J. Moutray,

Adam Duncan,

J. Cranstoun.

The

The court, pursuant to an order from the right honourable the lords commissioners of the Admiralty, dated the 31st December 1778, and directed to Sir Thomas Pye, proceeded to enquire into a charge exhibited by Vice Admiral Sir Hugh Palliser, against the Honourable Admiral Keppel, for misconduct and neglect of duty on the 27th and 28th of July 1778, in sundry instances, as mentioned in a paper which accompanied the said order, and to try him for the same; and the court having heard the evidence, and the prisoner's defence, and maturely and seriously considered the whole, are of opinion, that the charge is malicious and ill-founded, it having appeared that the said admiral, so far from having, by misconduct and neglect of duty, on the days therein alluded to, lost opportunity of rendering essential service to the state, and thereby tarnishing the honour of the British navy, behaved as became a judicious, brave, and experienced officer.

The court do therefore unanimously and honourably acquit the said Admiral Augustus Keppel of the several articles contained in the charge against him, and he is hereby fully and honourably acquitted accordingly.

Signed by the court.

G. J. Judge Advocate.

*Section 2. Sentence of honourable acquittal on the Honourable Captain Thomas Pakenham, commander of the Crescent, and his officers and ship's company.*

At a court martial assembled, and held on board his Majesty's ship Warspite, in Portsmouth Harbour, on Monday, July 30, 1781.

PRESENT.

## PRESENT.

Captain Richard Onflow, commander of his Majesty's ship *Bellona*, and second officer in command of his Majesty's ships at Portsmouth, president.

## CAPTAINS.

Ben. Caldwell,

C. Buckner,

Ant. Hunt,

Hon. C. Phipps,

Rob. Man,

Chr. Mason,

Math. Squire,

Rt. Hon. Lord Hervey.

John Knowles,

The court, in pursuance of an order from the commissioners for executing the office of lord high admiral of Great Britain and Ireland, &c. dated the 26th of this present month July, proceeded to enquire into the conduct of the Honourable Captain Thomas Pakenham, commander of his Majesty's late ship the *Crescent*, and such of the company as were on board her at the time she struck to the Dutch frigate, and into the conduct of lieutenant John Bligh, and such of the company of the said ship *Crescent* as were on board her at the time she was afterwards taken by the French frigate, and to try them respectively for the same accordingly. The court are unanimously of opinion that the Honourable Captain Thomas Pakenham, throughout the action, in a variety of instances, behaved with the coolest and ablest judgment, and with the firmest and most determined resolution, and that he did not strike the *Crescent's* colours, until she was totally unable to make the smallest defence. The court do therefore unanimously adjudge that the Honourable Captain Thomas Pakenham be honourably acquitted, and he is hereby unanimously and honourably acquitted accordingly. The court cannot dismiss Captain Pakenham, without expressing their admiration of his conduct on this occasion, wherein he has manifested the skill of an able and judicious seaman, and

the intrepidity of a gallant officer ; and from the great and extraordinary number of the killed and wounded on board the Crescent, as well as the state she was in at the time of surrender, the court expresses the highest approbation of the support given by the officers and men of the Crescent to their captain, and of their courage and steadiness during the action, a circumstance that, while it reflects high honour on them, does no less credit and honour to the discipline kept by Captain Pakenham ; and do therefore unanimously and honourably acquit the said officers and ship's company, and they are hereby unanimously and honourably acquitted accordingly ; and it appears to the court that the Crescent, being left by herself, having few men, and being in a very disabled state, she was in no condition to defend herself against two such large frigates, and that Lieutenant Bligh, the officers and ship's company, did their utmost to preserve the king's ship from the enemy, and do therefore unanimously adjudge that they be honourably acquitted, and they are hereby unanimously and honourably acquitted accordingly.

Signed by the court.

*W. H. Bettefworth,*  
*Judge Advocate on this occasion.*

Section 9. *Sentence of a court martial on Mr. John Wardell, master of his Majesty's armed transport Cyrus, for drunkenness, scandalous, infamous, and un-officer-like behaviour.*

AT a court martial, &c.

PRESENT,

Edmund Affleck, esq. commodore, &c. president.

CAPTAINS, &c.

The court (being all duly sworn) in pursuance of an order, &c. dated the 24th instant, &c. proceeded to the trial of Mr. John Wardell, master of his Majesty's armed transport



transport Cyrus, for having been guilty of drunkenness and incapacity, and scandalous, infamous, and un-officer-like behaviour, when commanding officer after the death of Lieutenant James Turner; and having heard the witnesses produced on the part of the crown, in support of the charge, and what the prisoner had to say in his defence, and very maturely considered the whole, the court is of opinion, that the charge is fully proved; and do therefore adjudge the said Mr. John Wardell to be broke as master of the said armed transport, and rendered incapable in future of holding any employment or office of trust in his Majesty's naval service, and he is hereby sentenced accordingly.

Signed by the court.

*Sentence of a court martial held on John Sutherland, for being the cause of the death of James Fitzgerald, a marine belonging to his Majesty's ship Grana.* Section 10.

AT a court, &c.

PRESENT,

Edmund Affleck, esq. commodore, &c. president.

CAPTAINS, &c.

The court, in pursuance of an order, &c. proceeded to the trial of James Sutherland, a seaman belonging to his Majesty's ship Grana, for being the cause of the death of James Fitzgerald, a marine belonging to the said ship, in a scuffle on the evening of the 26th of June last; and having heard the evidence on behalf of the crown, and what the prisoner had to offer in his defence, and very maturely considered the whole, the court is of opinion, that no marks of violence whatever appearing on the strict examination of the head and body of the deceased, to ascertain a blow

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given

given by the prisoner to be the occasion of his death, and although the death of the said James Fitzgerald might ensue in the scuffle between the prisoner and him by his fall or otherwise, they do acquit the said John Sutherland of all murder or intention of murder whatsoever, and he is hereby acquitted accordingly.

Signed by the court.

Section 11. *Sentence of a naval court martial on Mr. Hugh Atkins Reid, second mate of the Honourable East India Company's ship King George, carrying a letter of marque, for mutinous behaviour, disobedience of orders, and contempt to Mr. Richard Colnett, her commander, and insulting him in the execution of his duty on shore at Cape Town.*

[Referred to Vol. I. p. 186.]

AT a court martial assembled and held on board his Majesty's ship Stately, in Table Bay, Cape of Good Hope, on Tuesday the 16th day of January 1798, and by adjournment the next day.

#### PRESENT, CAPTAINS.

Valentine Edwards, esq. president.

John Osborn,

Andrew Tod,

John William Spranger,

Thomas Alexander.

The court, in pursuance of an order from Thomas Pringle, esq. rear admiral of the Red, and commander in chief of his Majesty's ships and vessels employed and to be employed at the Cape of Good Hope and seas adjacent, &c. &c. and directed to Valentine Edwards, esq. captain of his Majesty's ship Sceptre, and second officer in the command of his Majesty's ships and vessels in Table Bay; proceeded to try Mr. Hugh Atkins Reid, second mate of the Honourable East India Company's ship King George, (carrying a letter of marque), for having on the 22d day of December last been guilty of mutinous behaviour, disobedience  
of

of orders, and contempt to Mr. Richard Colnett, commander of the said ship, and also for having on the ninth instant insulted the said Mr. Richard Colnett, when in the execution of his duty on shore at Cape Town, by using reproachful and provoking speeches, and for striking him; and having heard the witnesses produced on the part of the prosecutor in support of the charges, and those produced by the prisoner in his defence, and having maturely and deliberately weighed and considered the whole, the court is of opinion, that the first part of the charges are proved against the prisoner; and the court are further of opinion, that the last article of charge, viz. in using reproachful and provoking speeches, and striking his commander, whilst actually employed in the execution of his duty on shore, is fully proved; but, as the clause of the act of parliament which subjects the officers and men serving in letters of marque, or privateers, to naval discipline, expressly states that all offenders shall be confined on board such ships until application can be made for a court martial, the court consider themselves restrained from passing the sentence of death, positively annexed to a breach of the 22d article of war, which says, "If any officer, marine, "or soldier, or other person in the fleet, shall strike his "superior officer, or draw, or lift up any weapon against "him, being in the execution of his office, on any pre- "tence whatsoever, every such person being convicted of "any such offence by the sentence of a court martial, "shall suffer death." By Mr. Reid's having been permitted when a prisoner to quit the ship, and remain on shore, the court doth *therefore* only adjudge the said Mr. Hugh Atkins Reid to be imprisoned two years in the prison of the Marshalsea Court, such imprisonment to commence on board the Hon. East India Company's ship King George, from the date of this sentence until the arrival of the said

ship in any port of Great Britain, from whence the prisoner can be sent in security to the prison of the said Marshalsea Court; and the said Mr. Hugh Atkins Reid is hereby so sentenced to be *imprisoned* accordingly.

(Signed) { Val. Edwards,  
J. Osborn,  
A. Tod,  
J. W. Spranger,  
T. Alexander.

Signed T. Tait, Judge Advocate.

Gravesend, 11th July 1798.

Received the body of the within named Mr. Hugh Atkins Reid into my custody, pursuant to orders from my lords commissioners of the admiralty, dated the 9th instant, to be carried to the Marshalsea prison.

RICHARD PEEN,  
Deputy Marshal.

No. XXXV. Letter from the Secretary of the Admiralty, relative to the Inconveniencies attending the Sentences of Courts Martial, naming particular Ships for Execution.

[Referred to Vol. II. p. 248.]

Sir,

Admiralty-office, Feb. 14, 1742.

I HAVE received and read to my lords commissioners of the admiralty, your letter of yesterday's date, inclosing the sentence and proceedings of a court martial held the fourth instant, on board the Shrewsbury, on  
Lawrence

Lawrence Gandy, and William Stalton, for desertion, and their lordships observing that the court names the particular ship on board which they are to suffer death; I am commanded to acquaint you, that they think the same may be liable to many inconveniencies, and that it should rather be left general, to suffer on board any of his Majesty's ships the president thinks fit. As an instance of which I am to inform you, that a seaman being lately condemned at a court martial held at Plymouth, to suffer death, and to be executed on board his Majesty's ship the *Nonsuch*, and the service requiring the immediate sailing of the said ship, there was not time to procure his Majesty's consent to the execution before she went to sea.

I am, &c.

J. CORBETT.

*Mr. Atkins, Portsmouth.*

No. XXXVI. Case and Opinion relative to Peter Finley, late Boatswain of the *Ferret* (who had been ordered to serve as a Seaman on board the *Iphigenia*), for stabbing Mr. Bruton, Master's Mate, of the *Ferret* Sloop.

[Referred to Vol. II. p. 244. 247.]

#### CASE.

*The following is a copy of the sentence of a court martial held on board his Majesty's ship Cumberland, in Hamoaze, on the 23d of March 1791, viz.* Section 1.

THE court, in pursuance of an order from the right honourable the lords commissioners of the admiralty, dated the 18th of March 1791, and directed to John Mac-

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bride,

bride, esq. captain of his Majesty's ship Cumberland, second officer in the command of his Majesty's ships and vessels at Plymouth, being duly sworn, proceeded to try Peter Finley, on a charge exhibited against him by Captain Nowel, of his Majesty's sloop Ferret, representing that Peter Finley, late boatswain of the said sloop, who had been ordered to serve in his Majesty's ship Iphigenia, came on board the sloop on the 26th of February last for his cloaths, when Mr. Bruton, the master's mate, having made up to speak to him, he the said Finley, gave him a violent stab with a long knife or dirk, which he had concealed under his coat, as supposed, for that purpose.

The court having heard the evidence in support of the charge, as well as what the prisoner had to offer in his defence, and maturely and deliberately considered the same, is of opinion that the charge is fully proved against the said Peter Finley.

And they do therefore adjudge the said Peter Finley to suffer death, by being hanged by the neck until he is dead, on board his Majesty's sloop Ferret, in Hamoaze, at such time as the right honourable the lords commissioners of the admiralty shall direct; and he is hereby adjudged to suffer death accordingly.

Signed as usual, by all the members composing the court, and also by the person who officiated as deputy judge advocate on the occasion.

*In the act of the 22d of George the Second, chap. 33. is contained the following 22d Article of War, viz.*

“ IF any officer, mariner, soldier, or other person in the  
 “ fleet, shall strike any of his superior officers, or draw, or offer  
 “ to draw, or lift up any weapon against him, being in the  
 “ execution of his office, on any pretence whatsoever, every  
 “ person

“ person so offending, being convicted of any such offence by  
 “ the sentence of a court martial; shall suffer death ; and if  
 “ any officer, mariner, soldier, or other person in the fleet,  
 “ shall presume to quarrel with any of *his* superior officers,  
 “ *being in the execution of his office*, or shall disobey any  
 “ lawful command of any of *his* superior officers, every  
 “ such person, being convicted of any such offence by the  
 “ sentence of a court martial, shall suffer death, or such  
 “ other punishment as shall, according to the nature and  
 “ degree of his offence, be inflicted upon him by the sen-  
 “ tence of a court martial.”

The lords commissioners of the admiralty have been pleased to direct this case to be laid before their counsel for his opinion; whether Mr. Bruton, the person stabbed by the prisoner, was *his* superior officer, within the spirit, true intent, and meaning of the said 22d article of war, notwithstanding they belonged to different ships at the time the offence was committed?

And upon the whole, whether the said sentence, passed upon the prisoner, may with propriety be carried into execution?

*Vide* the 23d and 36th articles of war (contained in the same act of parliament), also the minutes of the said court martial which are left herewith.

#### OPINION.

The rule of law, that penal statutes are not to be ex- Section 2:  
 tended by equity, is so general, and the cases in which  
 judges have scrupulously adhered to the strict letter of such  
 statutes in favour of life, are so numerous, that, from what  
 appears in the title of the minutes, and the charge as stated  
 in the sentence of the court martial, I think that Mr. Bru-  
 ton was not the prisoner's superior officer in the execution  
 of his office, according to the strict letter of the 22d article  
 of

of war, and that he would not be considered as coming within that description in a court of law: but I do not conceive it possible to form any judgment on the latter part of this question; as the sentence of the court martial does not specify on what articles of war the adjudication is founded. There is no article applicable to the present case, in which the punishment of death is expressly mentioned, but the 22d; and there are only two other articles which can by any construction be applied to this case; the 23d article, if applicable to it, authorizes such punishment as the offence shall deserve, and the court martial might be well warranted in an opinion that the prisoner's offence deserved the *ultimum supplicium*; but I know no instance, in which a discretionary power has been exercised to that extent, where the offence has not been capital by the common law, or made so by act of parliament. The prisoner's offence is certainly of such a nature as to deserve the severest punishment which is authorized by law: it is what the parliament have particularly taken notice of, and passed an act to prevent, by 1 James I. chap. 8. commonly known by the statute of stabbing, but they did not make it capital unless the person stabbed should die within six months. The 36th article of war comprehends generally all other offences not capital, and refers to the usage at sea; but no precedent is shewn, nor is it likely that there should be any, that a capital punishment has been adjudged for an offence not capital. There are therefore two difficulties in this case, which appear to me of the greatest importance.

FIRST, The legality of the sentence which is worthy of the consideration of the highest legal authority. And,

SECONDLY, The propriety of carrying the sentence into execution, which, as the grounds of it are not disclosed, must



must be left to the judgment of those ministers who are properly observed by Mr. Justice Foster to be appointed by the crown for the ends of public justice.

(Signed) F. C. CUST,

April 2, 1791.

No. XXXVII. Admiralty Order of Reprieve and Pardon.  
[Referred to Vol. II. p. 272.]

*By the Commissioners for executing the Office of Lord High Admiral of Great Britain and Ireland, &c. &c.*

**W**HEREAS, by our warrant of yesterday's date, you were directed to cause the sentence of death passed Secret.  
(L. S.) by a court martial on Samuel Ball and Michael Swinney, belonging to his Majesty's ship *Rainbow*, for desertion, to be carried into execution on Thursday the 21st of this month: And whereas the King hath been most graciously pleased to extend his royal mercy to the said Samuel Ball and Michael Swinney, and to signify his pleasure that they should be pardoned; but that, in order to imprint on their minds a lasting remembrance of the crime, for which their lives have been so justly forfeited, the same should not be made known to them until the day appointed for their execution; you are hereby required and directed to keep the whole of this order extremely secret, until the said Samuel Ball and Michael Swinney shall, on that day, be brought upon deck, and every thing shall be prepared for their execution agreeable to the custom of the navy, and then you are to make known to them his Majesty's pleasure above mentioned, and to release them from their confinement; letting them know at the same time how unmerited and

and undeserved on their parts this mark of the King's clemency and goodness is, and therefore how incumbent on them it will be to avoid, for the remainder of their lives, every offence that may again expose them to so great and manifest a hazard as that which they have so providentially escaped, as the contrary will inevitably deprive them of every chance of forgiveness again. And having so done, you are to send them back to their duty on board the *Rainbow*, where they are to continue to serve as part of the complement till further order; for which this shall be your warrant. Given under our hands and the seal of the office of admiralty, this 15th of November 1771.

J. BULLER,  
PALMERSTONE,  
A. HENRY.

*To Thomas Pye, Esq. vice  
admiral of the Red, and  
commander in chief of his  
Majesty's ships and vessels  
at Portsmouth.*

By command of their lordships,

PHILIP STEPHENS,

No. XXXVIII. To remit Punishment.

[Referred to Vol. II. p. 272.]

Sir,

*Admiralty-office, May 17, 1780.*

I HAVE communicated to my lords commissioners of the admiralty your letter of yesterday's date, informing them, that as the two seamen, named in the margin, had been sentenced by a court martial to receive 500 lashes for  
mutinous

mutinous behaviour on board the Invincible, you had excused one half of the punishment to be inflicted upon them, and recommending them, for the reasons therein mentioned, as objects deserving their lordships' pardon; in return, I am commanded by their lordships to signify their direction to you to remit the remainder of their punishment.

PHILIP STEPHENS.

*Admiral Sir Thomas Pye.*

No. XXXIX. Corporal Punishment.

[Referred to Vol. II. p. 273.]

*Orders for carrying corporal punishment into execution.*

*To the Captain of the Flag Ship.*

By, &c.

A COURT martial, held the—— instant, having sentenced —— to receive 300 lashes on his bare back with a cat-of-nine-tails, alongside of such of his Majesty's ships and vessels at this port, at such times and in such proportions as shall be directed by the commanding officer of the said ships and vessels for the time being: Section 2.

You are hereby required and directed to hoist a yellow flag at the foretopmasthead of his Majesty's ship under your command, and fire a gun at nine o'clock to-morrow morning, as a signal for the boats of the fleet to assemble alongside of his Majesty's ship ——, to attend the said punishment.

*To the captains and commanders of the other ships and vessels.*

*Mem.*

WHEN the signal for punishment is made to-morrow morning, you are to send a lieutenant with a boat manned

Section 2.

and armed from the ship under your command to his Majesty's ship —, in order to attend the punishment of —, pursuant to the sentence of a court martial.

*To the respective captains, &c. Spithead.*

### No XL. Corporal Punishment.

[Referred to Vol. II. p. 273.]

*To the commander of the ship to which the prisoner belongs.*

By, &c.

Section 1.

A COURT martial, held the 12th instant, on board his Majesty's ship A. for the trial of B. C. a seaman belonging to the ship you command, having sentenced him to receive 300 lashes on his bare back, with a cat-of-nine-tails, alongside such of his Majesty's ships and vessels at this port, at such times and in such proportions as shall be directed by the commanding officer of the said ships and vessels for the time being; you are hereby required and directed, when the signal is made for that purpose on board the A. to-morrow morning, or the first favourable day afterwards (Sundays excepted), to cause one of the lieutenants of the ship you command to attend and see the said sentence put in execution, by the said B. C. receiving twenty lashes alongside such of his Majesty's ships named in the margin. [The ship's name to which the prisoner belongs is always to be put in the margin, with the others; but in case the number should not fall even, he is to receive the odd lashes over on board his own ship, and the words in the order are as follow, "*And alongside the ship you command,*" you are to cause him to receive "*twenty five, or more, or less, lashes.*"] And you will receive herewith a  
copy

copy of the sentence, to be publicly read by the provost marshal, alongside each ship respectively.

Given, &c.

R. SPRY.

*Right Hon. Capt. Barrington, Albion.*

By, &c.

Whereas I have by an order of this date, directed you Section 2.  
to cause one of the lieutenants of his Majesty's ship under your command, to see the sentence of the court martial, on B. C. belonging to the same ship, put in execution : But as I would not have more of the said punishment inflicted upon him, at one time, than he is able to bear, and as the lieutenant may not be a proper judge of the prisoner's case, you are hereby required and directed to cause the surgeon of the said ship to attend in the boat with the lieutenant for that purpose, as well as one of his mates, in the long boat, with the prisoner, and you are to give the lieutenant directions to stop the punishment till further orders, when the surgeon shall give it as his opinion, that he cannot bear any more with safety, and return on board with the prisoner \*.

Given, &c.

*To the Right Hon. Capt. Barrington, Albion.*

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\* The purport of this order is frequently included at the end of the preceding, and which we deem a better form than making two separate orders.

## No. XLI. Corporal Punishment.

[Referred to Vol. II. p. 274.]

*Order to the Provost Marshal.*

By, &amp;c.

## Section 1.

**H**AVING ordered the sentence of the court martial on William Evans, the prisoner in your charge, to be put in execution next Thursday morning, or the first favourable day afterwards (Sunday excepted):

You are hereby required and directed to attend with him on board his Majesty's ship Albion, for that purpose, whenever the signal shall be made on board the Ocean; and when the said prisoner shall have received the whole of the punishment adjudged him, you are to release and deliver him to the commanding officer of the Albion.

Given, &amp;c.

I. A.

*To Mr. J. G. Provost Marshal.*

*Order to the Provost Marshal to attend the execution of a sentence of death.*

By, &amp;c.

## Section 2.

**T**HE King having been pleased to approve of the sentence of death, passed by the court martial, on Walter Stanford, one of the prisoners in your charge, and the lords commissioners of the admiralty having ordered the same to be put in execution:

You are hereby required and directed to attend with him, for that purpose, on board his Majesty's ship the Albion, on Thursday the 7th instant, at ten o'clock in the morning, and to follow such orders as you shall receive from Lieutenant Hill, first lieutenant of the said ship.

Given, &amp;c.

J. A.

*Mr. J. G. Provost Marshal.*

No. XLII.

## No. XLII. Orders for carrying the Sentences of Death into Execution.

[Referred to Vol. II. p. 274.]

*To the commander of the ship to which the prisoner belongs.*

By, &amp;c.

**W**HEREAS at a court martial, held on board his Majesty's ship the Ocean, in Hamoaze, the 22d day of last month, Captain Edward Le Cras, commander of the said ship, being president, a sentence was passed to the effect following; viz. The court, in pursuance of an order from the right honourable the lords commissioners of the admiralty, dated the 8th of February 1777, proceeded to try Walter Stanford, for having a fourth time deserted from his Majesty's ship the Albion; and having heard the evidence, and what the prisoner had to offer in his defence, and very maturely considered the same, are of opinion, that the charge against him is fully proved. The court do therefore adjudge the said Walter Stanford to be hanged by the neck until he is dead, at the yard arm of such of his Majesty's ships, and at such time, as shall be directed by the lords commissioners of the admiralty; and the said Walter Stanford is hereby sentenced to be hanged by the neck until he is dead accordingly. And whereas the king has been pleased to approve of the sentence of death, passed on the said Walter Stanford, and the right honourable the lords commissioners of the admiralty have, in pursuance of his Majesty's pleasure, directed me by their warrant, bearing date the 29th of last month, to cause the said sentence to be put in execution, on Thursday the 7th day of this month, on board the Albion at Plymouth:

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You

You are therefore hereby required and directed to see the said sentence carried into execution accordingly, on Thursday, the 7th day of the month, at 11 o'clock in the forenoon, by causing the said Walter Stanford to be hanged by the neck until he is dead, at the fore-yard-arm of his Majesty's ship the Albion, for which this shall be your warrant.

Given, &c.

J. AMHERST.

*To Lieutenant Hill, Commanding Officer of his Majesty's ship the Albion.*

*Order to the Commanding Officer to make the Signal.*

By, &c.

Section 2.

YOU will herewith receive a warrant for carrying into execution the sentence of death passed by a court martial on Walter Stanford, and having ordered a lieutenant with a boat manned and armed to be sent from each of his Majesty's ships here, to assist in carrying the same into execution, when the signal shall be made on board the Albion, by hoisting a yellow flag at the fore-top-gallant mast head, and firing a gun :

You are hereby required and directed to make such a signal, at ten o'clock next Thursday morning, and to apply to the lieutenant commanding boats for some men out of each boat, to assist in the execution of the said sentence.

Given, &c.

*Lieutenant Hill, Albion.*

*Another*



*Another form of order to the Commanding Officer of the ship to which the prisoner belongs.*

By, &c.

YOU will herewith receive a warrant for carrying into execution the sentence of death passed by the court martial on John Webber, belonging to his Majesty's fire-ship *Blast*, and having ordered a lieutenant with a boat manned and armed, to be sent from each of his Majesty's ships at this port, to assist in carrying the same into execution, on Tuesday next the 13th instant, precisely at ten o'clock. Section 3.

You are hereby required and directed to apply to the above mentioned lieutenants for as many men out of each boat, as you shall judge necessary to assist in hanging the said John Webber accordingly.

The *Heart of Oak* armed ship, on board which my flag is flying, will hoist a yellow flag at her fore-top-mast head, and fire a gun at the time specified; you are to repeat the signal, and just before the prisoner is run up to the yard arm, you are to fire another gun, as a signal for the different ships to observe the execution.

Given, &c.

*Captain Penny, Marlborough.*

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No. XLIII. Orders for carrying Sentence of Death into Execution, continued.

[Referred to Vol. II. p. 274.

*To the Captain of the flag ship, to make the signal for the boats of the fleet to rendezvous.*

By, &c.

THE king having been pleased to approve of the sentence of death passed by the court martial on Henry Lee, belonging to his Majesty's ship *Romney*, and the right Section 2.

honorable the lords commissioners of the admiralty having ordered the said sentence to be carried into execution, on Thursday the 1st of March next :

You are hereby required and directed to hoist a yellow flag at the fore-top-mast head of his Majesty's ship under your command, and fire a gun at nine o'clock in the morning of the day above mentioned, as a signal for the boats of the fleet to rendezvous alongside of his Majesty's ship the Victory, where I have ordered the said Henry Lee to be executed.

Given, &c.

*To Captain Hunt, Diligent.*

*To the respective Captains of the ships, to send boats manned and armed to attend.*

*Memorandum.*

Section 2.

Having ordered the sentence of death passed by a court martial on Henry Lee, belonging to his Majesty's ship Romney, to be put in execution to-morrow morning at nine o'clock :

You are to send a lieutenant with a boat manned and armed from the ship under your command to the Victory, to be there at the time above mentioned, in order to assist and attend the said execution.

*To the respective Captains and  
Commanders of his Majesty's  
ships and vessels, Spithead.*

## No. XLIV.

*Certificate by the President of a court martial to the officiating Judge Advocate, and which entitles him to four pounds for each court martial, or at the rate of eight shillings per day for the time employed\*.* [Referred to Vol. I. p. 284.]

THESE are to certify, that Mr. John Macarthur officiated as judge advocate at a court martial, at which I presided, held on board his Majesty's ship Assurance, in the North River, New York, the 18th day of May 1782, for the trial of Hamilton Wood, belonging to his Majesty's ship Narcissus, for mutiny and sedition, and that he was employed twelve days in making preparations for the trial, attending the court, and copying and transmitting the minutes of proceedings.

Given on board his Majesty's ship Santa Margareta, in the North River, New York, this 30th day of May 1782,

(Signed) ELLIOT SALTER.

## No. XLV.

*Protest by Lieutenant Gerald Fitzgerald of the 11th regiment of foot, to being tried by a naval court martial, and sentence of the court,* [Referred to Vol. I. p. 201, 202, 203.]

Mr. President and Gentlemen of the Court,

AT the same time that I beg leave to avow the highest Section 1.  
respect for this court, and every reliance on its justice and perfect confidence on the rectitude of my conduct, yet

\* Although a trial may last only a few hours, it is usual at home to insert *ten days* in the certificate, and abroad *twelve days* for each trial. This includes the whole time employed in preparing and summoning parties and witnesses, attending the trial on the day appointed, and copying the minutes of proceedings for the purpose of being transmitted to the Secretary of the Admiralty.

I should think myself deficient in the duty I owe the profession to which I have the honor of belonging, if I did not solemnly in open court protest against this mode of trial, being (I conceive) in the present circumstance unnecessary, if not illegal. I purchased my commission in his Majesty's land forces, whose martial law (when attainable) an officer of the army should certainly be responsible to in preference to that of the navy, to which, however, both justice and the good of the service would command a submission, in cases of mutiny, or crimes of such magnitude on board ship as require immediate investigation; no such emergency can now be said to exist; the very charge exhibited does not even approach so serious a description; and a military court martial, to which I am indisputably answerable, can be had recourse to without the service suffering the smallest inconvenience. I do therefore demand such court martial as my just right, if not by law, at least by precedent, which is almost as much to be regarded; and am authorized by the majority of the officers of the army serving in the fleet, to declare it to be their opinion, that I have done no more than my duty; that if I had done less I should incur the disapprobation of my own service; those reasons considered, I should hope you will have the justice to admit the expediency of my declining to enter into any defence before this court, and reserving those evidences which I am confident must acquit me before a military court martial, which I have the best authority to believe can be (in this case) my only lawful tribunal.

GERALD FITZGERALD,

Lieut. 11th Reg. of Infantry.

*His Majesty's ship Diadem,*

*3d July 1795.*

At

At a court martial assembled, and held on board his Ma- Section 2.  
 jesty's ship *Princess Royal*, in *St. Fiorenzo Bay*, *Corfica*,  
 on Friday, the 3d day of July 1795.

## PRESENT,

Samuel Granston Goodall, esquire, vice admiral of the  
 White, and (for the time being) second in command  
 of his Majesty's fleet in the Mediterranean, president,  
 Sir Hyde Parker, knight, vice admiral of the Blue,  
 Robert Linzee, esquire, rear admiral of the Red,  
 Robert Man, esquire, rear admiral of the Blue,  
 John Holloway, esquire, captain of the fleet.

## CAPTAINS.

Samuel Reeve,	John Pakenham,
John Bazely,	James Douglas,
William Young,	Bartholomew Samuel Rowley,
Horatio Nelson,	John Knight.

Captain Charles Chamberlayne of his Majesty's ship  
*Bombay Castle*, who is senior to Captain Horatio Nelson,  
 having certified the president of his inability to attend  
 through ill health.

The court, in pursuance of an order from William Ho-  
 tham, esquire, admiral of the Blue, and (for the time being)  
 commander in chief of his Majesty's fleet in the Mediter-  
 ranean, dated the 25th May 1795, proceeded to try Lieu-  
 tenant Gerald Fitzgerald, of his Majesty's 11th regiment  
 of foot, serving as marines on board his Majesty's ship  
*Diadem*, for having behaved with contempt to Charles  
 Tyler, esquire, captain of the said ship, his superior officer,  
 when in the execution of his office, on the 24th day of  
 May last; and having heard the evidence for the crown in  
 support of the charge, and the prisoner having denied the  
 legality of the court, and refused to make any defence, the  
 court proceeded to take into consideration the evidence

produced in support of the charge, and having maturely and deliberately considered the same, is of opinion that the charge is proved; the court does therefore adjudge the said Lieutenant Gerald Fitzgerald to be dismissed from his Majesty's service, and to be rendered incapable of ever serving his Majesty, his heirs and successors, in any military capacity; and he is hereby sentenced to be dismissed from his Majesty's service, and to be rendered incapable of ever serving his Majesty, his heirs and successors, in any military capacity, accordingly.

(Signed)

S. Goodall,	William Young,
Hyde Parker,	Horatio Nelson,
Robert Linzee,	John Pakenham,
Robert Man,	James Douglas,
John Holloway,	Bartholomew Sa-
Samuel Reeve,	muel Rowley,
John Bazely,	John Knight,

*George Noble, appointed to officiate  
as Judge Advocate on the above  
occasion.*

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No. XLVI. Representation of the Flag Officers respecting the Duke of York's Order for trying Army Officers. [Referred to Vol. I. p. 203.]

*Correspondence of the Admirals and Captains of the fleet at Portsmouth with the Lords of the Admiralty, respecting the proposed regulations of the Field Marshal his Royal Highness the Duke of York, for troops who might be serving on board his Majesty's ships of war.*

My Lords, *Portsmouth, 1st November 1795.*

Section r,

WE have perused and considered with great attention an additional article of war, signed by his Majesty, to be annexed to the present code for the army, together with

with the copy of a letter written by the Field Marshal his Royal Highness the Duke of York to Lieutenant General Sir Ralph Abercrombie, containing certain regulations for the government of his Majesty's troops under that article, who may be *serving on board his Majesty's ships of war*.

We beg leave to represent to your Lordships, that we see with the utmost concern an order from your Lordships, enjoining the strictest attention to be paid thereto by the respective officers of the navy.

We are of opinion the proposed regulations militate against the principles of the naval service, inasmuch as they appear to us to be in direct contradiction to the statute for the government of his Majesty's ships, vessels, and forces by sea; and *must*, if endeavoured to be carried into execution, inevitably cause the total destruction of the navy of this country.

We are, &c.

(Signed)	{	<i>Peter Parker,</i>	<i>Roger Curtis,</i>
		<i>W. Cornwallis,</i>	<i>Richard Rodney Bligh,</i>
		<i>Ch. Thompson,</i>	<i>Hugh C. Christian,</i>
		<i>W. Waldegrave,</i>	<i>Charles M. Pole.</i>

*To the Lords Commissioners  
for executing the office  
of Lord High Admiral,  
&c. &c. &c.*

Sir, *Admiralty Office, 2d November 1795.*

HAVING read to my Lords Commissioners of the Admiralty a letter of yesterday's date, signed by you and the rest of the flag officers now serving on board his Majesty's ships at Portsmouth, stating your opinion of the effects likely to be produced by the additional article of war lately established, and the regulations directed to be adopted for the government

Section 2.

government of his Majesty's troops under that article, who may be serving on board his Majesty's ships of war; I am commanded by their Lordships to acquaint you that the subject is under consideration, and that they are not without hopes some arrangement may be made for removing, in some degree, the difficulty which appears to be felt on this occasion.

In the mean time, their Lordships have directed me to express their expectation, that the doubts which have arisen on this important point may not operate to the retarding of the service on which some of his Majesty's ships are now ordered, and which cannot be delayed one moment without extreme prejudice to the public service.

I am, Sir,

Your most obedient humble servant,

(Signed) EVAN NEPEAN.

*Admiral Sir Peter Parker, bart.*

*Portsmouth.*

Section 3.

Sir,

*Portsmouth, 3d November 1795.*

ADMIRAL Sir Peter Parker has submitted to our perusal your letter of yesterday's date, wherein you inform us, by their Lordships' command, in reply to our representation to their Lordships, dated the 1st instant, "that the subject is under consideration, and that their Lordships are not without hopes, some arrangements may be made for removing in some degree the difficulties which appear to be felt on the occasion."

We feel it a duty we owe our king and our country, to represent to their Lordships our firm and decided opinion, that no modification of the statute, by virtue of which his Majesty's ships, vessels, and forces by sea is governed, can be made, whereby the long established authority of the naval officers may be diminished, without involving the destruction



tion of the navy of this country; and we are of opinion, that, notwithstanding the regulations which have been ordered to be carried into effect, that, by virtue of the statute above recited, all officers and soldiers serving on board his Majesty's ships are amenable to a naval court martial, for we cannot imagine that any regulations made by the field marshal his Royal Highness the Duke of York, can have authority in the fleet, more especially when they are at variance with an act of parliament.

We beg leave to express our satisfaction at the orders received by Sir Peter Parker, and which he has communicated to us for the disembarkation of troops in several ships, and replacing them by marines.

We are, Sir,

Your most obedient servants,

(Signe:)	{	<i>Peter Parker,</i>	<i>Roger Curtis,</i>
		<i>W. Cornwallis,</i>	<i>R. Rodney Bligh,</i>
		<i>Ch. Thomson,</i>	<i>Hugh C. Christian,</i>
		<i>W. Waldegrave,</i>	<i>Ch. M. Pole.</i>

*Evan Nepean, Esq. &c. &c. &c.*

## XLVII. Correspondence respecting the Conduct of Troops when on board of King's Ships.

[Referred to Vol. I. p. 205, 206.]

*His Majesty's Ship Niger, Torbay,*

Sir,

18th April 1800.

I BEG leave to inform you, for their lordships information, that Colonel Talbot, commanding officer of the 2d battalion of the 5th regiment, on board his Majesty's ship under my command, has this day, contrary to my orders, as well as contrary to the 23d section of the Army Articles

Section 1.

articles

ticles of War, tried by a court martial a serjeant, and broke him, and thinks he has a right to try and break officers, but not to punish. This I differ with him in, and would wish to have their lordships orders respecting its influence.

I am, Sir, &c. &c. &c.

(Signed) JOHN LARMOUR.

*To Evan Nepean, Esq. &c. &c. &c.*

Section 2.

Sir,

*Admiralty-Office, 21st April 1800.*

HAVING laid before the lords commissioners of the Admiralty your letter of the 16th instant, representing, that Colonel Talbot has held a court martial on one of the serjeants of the 5th regiment of infantry, embarked on board the ship under your command, and that he has a right to do so while on board her; I am commanded by their lordships to acquaint you, that having communicated your letter to the commander in chief, his Royal Highness has been pleased to give orders, that no courts martial may in future be attempted to be held by the officers of the troops while on board his Majesty's ships.

I am, Sir, yours, &c. &c. &c.

(Signed) EVAN NEPEAN,

*To Captain Larmour, his Majesty's ship Niger.*

Section 3.

Sir,

*House Guards, 19th April 1800.*

HAVING had the honour to lay before the commander in chief your letter of the 16th instant, I have it in command to acquaint you, that convening of regimental courts martial on board of king's ships is contrary to the rules of the navy, and his Royal Highness desires, that such proceedings may not in future take place in the regiment under your command, while in its present situation. In cases where holding a court martial may be necessary, that measures may be postponed until your disembarkation, and when  
immediate

immediate punishments are necessary for the support of due subordination, it will be for the good of his Majesty's service, that you should have recourse to the discipline of the ship, to be inflicted under the authority of the captain. On all occasions of difficulty, you will be pleased to address yourself to Major General Pigot, under whose immediate command you are.

I am, Sir, your's, &c. &c. &c.

(Signed) ROBERT BROWNRIGG.

*To Lieut. Col. Talbot, &c. &c. &c.*

Sir, *Horse Guards, 19th April 1800. Section 4.*

BY the commander in chief's command, I transmit to you the inclosed copies of two letters received from the Admiralty, and from Lieutenant Colonel Talbot of the 5th regiment, together with a copy of the answer given to the latter, and his Royal Highness desires that you will be pleased to cause it to be made known to the commanding officers of regiments under your command, that the holding of general or regimental courts martial on board his Majesty's ships of war is contrary to the rules and discipline of the navy, and is on no account to be practised. All measures of that nature must be suspended until the disembarkation of the troops; and in cases when immediate punishments are absolutely necessary for the support of due subordination, it will be adviseable, that recourse be had to the discipline of the ship on board of which troops are embarked, to be inflicted under the authority of the respective captains.

I am, Sir, yours, &c. &c. &c.

(Signed) ROBERT BROWNRIGG.

*To Major Gen. Pigot, Torbay.*

Sir,

Section 5.

Sir, *Admiralty Office, 20th April 1800.*

I AM commanded by my lords commissioners of the Admiralty, to send you herewith the copy of a letter which I have received from Captain Larmour of the Niger, with copies of two Letters from Colonel Brownrigg to Major General Pigot and Lieutenant Colonel Talbot, on the subject of a court martial, which had been held on board that ship by order of the last-mentioned officer on one of the serjeants of the 5th regiment of infantry, embarked on board the said ship, and to signify their lordships directions to be particularly careful in preventing any of the troops on board from being struck or otherwise improperly treated, and to endeavour by every means in your power to establish a good understanding between the officers and men of his Majesty's ships, and the officers and men of the troops while embarked on board of the said ships.

I am, Sir, &amp;c. &amp;c. &amp;c.

(Signed) EVAN NEPEAN.

*To Captain Page, of his Majesty's  
ship Inflexible, Torbay.*

XLVIII. Opinions of the Attorney General, Solicitor General, and Counsel, for the Affairs of the Admiralty and Navy, respecting the Case of William Muspratt, who had been sentenced to suffer Death. [Referred to Vol. II. p. 128.]

*Opinion of the Attorney General thereon.*

Section 1.

THE prayer of the petition presented to the lords commissioners of the Admiralty by William Muspratt is, that their lordships would afford him an opportunity to lay his particular hard case before the throne for mercy, and

that they would be pleased to give that countenance and support to such application as their lordships, under the circumstances of his case, should seem meet. In his petition he refers to a paper delivered into court, by which he was tried for mutiny jointly with other prisoners, stating as follows: "It is every day's practice in the criminal courts of justice in the land, when a number of prisoners are tried for the same facts, and the evidence does not materially affect some, for the court to acquit those that are not affected, that the other prisoners may have an opportunity to call them if advised so to do; I beg to have the opportunity of calling Byrn and Norman." The paper delivered into court by the prisoner does not assert, in explicit terms, whether the practice alluded to as taking place in the criminal courts on land is discretionary in the court, or whether a prisoner charged jointly with others with having committed a capital offence, has a right to require that the judge shall take the opinion of the jury on the cases of such other prisoners as he shall point out, conceiving that the evidence does not materially affect them. If this practice be matter of found discretion in the judge proceeding upon his view of the materiality of the evidence given, and if (as the paper intimates) the practice in naval courts martial ought to be the same; the question then will be, whether the court in the present case exercised its discretion properly or improperly, of which their lordships, who have the minutes of the trial before them, are the proper judges.

The other view of the case involves in it two questions of very considerable importance: 1st, Whether such a claim as that made by the prisoner, if it were made in a court of common law, must be allowed as matter of right. 2dly, Whether if that be the case, the same must necessarily be the case in naval courts martial. Upon the true exposition of the law respecting those two points will depend,

Section 5.

Sir,  
 I AM comr  
 Admiralty, &c  
 I have recd  
 copies of  
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 fr

of death pronounced upon the  
 not to be carried into execution.  
 humbly presume, according to their usual  
 rely on any authority inferior to that of  
 proper council in such cases, namely, that  
 of his judges of the common law, as the  
 respects the legality of a trial in which will de-  
 the execution of a sentence of death; and because it  
 of importance to all future courts martial, that it should  
 be solemnly settled, whether they have the discretion  
 which in the present case they have disclaimed, or if it be  
 matter of discretion, whether the prisoner can call  
 upon them of right to decide the cases of others, in order  
 to call them as witnesses if they are acquitted. In the  
 present case they will probably be the more inclined so to  
 do, as the requisition of Muspratt is grounded upon the  
 practice of the judges in their courts, the principles of which  
 they are best acquainted with. But lest it should appear  
 to their lordships that observations from inferior authority  
 can be of any use, I shall humbly state such as occur to me.

It happens not unfrequently in the courts of common  
 law, that the judge, when no evidence upon which a con-  
 viction can legally follow is given against one or more  
 of the prisoners charged in the same indictment, without  
 being concerned in the same crime, recommends it to the  
 jury, if they see the evidence in the same light, to acquit  
 such prisoners before the others enter on their defence;  
 this may happen from the suggestion of any of the pri-  
 soners; but in all cases I humbly apprehend that it depends  
 upon the sound discretion of the judge, whether he will  
 take the sense of the jury upon particular prisoners, accord-  
 ing as he shall think there is or is not any evidence given  
 against them, which ought to be left to the jury; or ac-  
 cording as he shall be satisfied from the nature of the case,

Nothing can arise in the course of the defence of the prisoners which may affect those upon which it is proposed to decide, in the first instance, where, for example, the prosecutor has been manifestly misled by appearances; or where it is obvious that some were involved in the indictment, for the purpose of disabling them from being witnesses, and the like. But if there be any evidence on which the jury can deliberate, and which may receive confirmation by going through the whole case, I apprehend the judge would proceed and go through with the whole. In the present case the fact of Byrn and Norman having continued on board the *Bounty* was *prima facie* evidence of their guilt; how far this *prima facie* evidence of their guilt (which would arise from the bare fact of their remaining in the county) was done away before the petitioner was called upon to make his defence, can only be known to the court martial. The inconvenience at least of such a right existing as that on which the petitioner seems to rely, may appear from supposing that his application had been complied with, and Byrn and Norman had been acquitted, yet that, from the examination and cross examination of witnesses in the course of the prisoner's defence, their guilt had been established. This is a possible case, and may serve to show the difficulty of conceiving the practice of the courts of common law to rest on any other foundation than the discretion of the judge guided by all the circumstances of the case, as it shall seem to him that the justice of the case will or will not be best attained by deciding upon all collectively, or upon some separately. The usage and practice of the navy, as stated by the court martial, will be material to be ascertained if their lordships resort to the judges (as I humbly conceive they will), as that may supercede any consideration of what passes in their own courts.

I have forborne to advert to the matter of the affidavits (in which it is observable that Byrn does not join), as the question whether the petitioner was properly tried or not, will, as I conceive, turn upon the point to which I have principally adverted.

(Signed) A. MACDONALD.

October 22d, 1792.

Section 2.

*Opinion of the Solicitor General on the foregoing Case.*

I AM humbly of opinion that the circumstances of this case do afford an objection to the carrying this sentence of the court martial into execution, as far as it respects Muspratt, at least till the opinion of his Majesty's judges shall have been obtained upon the question, whether his application to have the sentence of the court martial pronounced upon the prisoners, whose testimony was represented to be material to the establishment of his innocence, in order that they might be rendered capable if acquitted of giving their testimony in his behalf, ought not to have been granted. It is certainly usual in criminal cases, in order to give a prisoner the benefit of such testimony, the credit of which when given the court judges of, to direct previous acquittals of other innocent persons indicted at the same time, in order to enable them to give that testimony. And I apprehend this would obtain in capital cases. I do not observe that the terms in which the court martial has expressed its judgment upon the application made in behalf of this prisoner, clearly import that this is not the practice of courts martial, though I must understand the court to mean to assert, that it is the practice of courts martial not to give sentence on any particular prisoner till the whole of the evidence (as well as the defences) in behalf of all the prisoners is gone through; whether that practice is col-



lected from the mere fact, that such applications on behalf of prisoners have been so unusual that no instances are remembered of them, or from the habit and usage of rejecting such applications, such having been made and rejected, it may be very material to enquire before it can be determined, that there has been such a practice in courts martial to exclude this evidence, as would form the law of such courts that it should be rejected. And I think the prisoner might reasonably be thought entitled to have the opinion of his Majesty's judges upon the effect in law of the practice, if proved, to reject such applications whenever they have in fact been made. If such a practice has obtained so generally, as to make it a rule of proceeding and of law in these courts to reject such applications, it is a consideration deserving of great attention, but not falling within the meaning of the question proposed to me, how far, if a case exists in which a prisoner has made admissions, which he has made by advice given under a mistaken notion of the rule of proceeding, and has suffered by those admissions; and by the rule of proceeding has been deprived of the evidence which would have a general tendency to establish his innocence, and to give those admissions the same tendency the harshness of the rules should or should not be corrected.

I have humbly presumed to refer to the opinion of his Majesty's judges, because it appears to me that in a case affecting the life of the subject, it is usual to give the subject the protection which he can find only in their wisdom, and because in such a case it must be most satisfactory to the public, and to those who are to direct, or to suspend the execution of a sentence of death, to look to that wisdom for a solution of any doubts which can be started respecting the legality of directing the execution of it.

(Signed) JOHN SCOTT.

Oct. 18, 1792.

Section 3. *Opinion of Council for the affairs of the Admiralty and Navy on the foreſaid Caſe.*

IT has certainly been a common practice in courts of law, where ſeveral perſons are accuſed of the ſame offence in one indictment, to direct an immediate acquittal of thoſe againſt whom no evidence at all ſhall have been given, becauſe the other priſoners are not to be prejudiced by a wrong indictment having been preferred. For the ſame reaſon, I ſhould humbly ſubmit that perſons accuſed before a court martial, if the articles are totally unſupported by any proof, ought to be diſcharged, if by their diſcharge the other priſoners will be enabled to eſtabliſh their innocence.

The caſe of William Muſpratt appears to me to deſerve great conſideration on that account, for if the priſoners Norman and Byrn appeared to be entirely innocent of the offence imputed to them, it muſt appear a great hardſhip to deprive Muſpratt of their teſtimony. I conceive that the practice which has been referred to, obtain only in caſes where the charge againſt the priſoners who are acquitted is unſupported by any evidence whatever; for it is not in the power of one priſoner to take the opinion of the court upon the charges reſpecting other priſoners upon a doubtful caſe, and the propriety of denying the application will not depend upon an eventual acquittal. But in the preſent caſe of the priſoners, Norman and Byrn appeared clearly innocent to the court, at the time when the application was made. I am humbly of opinion that the court might have pronounced the ſentence of acquittal immediately; and in as much as Muſpratt has loſt the advantage which he could on that caſe have reaped from their teſtimony, it might be proper for the lords commiſſioners of the Admiralty to interpoſe in his behalf in obtaining the royal mercy.

(Signed) THOMAS BRODERICK.  
Lincoln's Inn, Oct. 20, 1792.

No. XLIX. Letters of Accusation preferred by Rear Admiral Sir John Orde, Bart. against the Earl of St. Vincent, Commander in Chief, &c. and Correspondence with the Lords Commissioners of the Admiralty, on the Subject of his being refused a Court Martial.

[Referred to Vol. I. p. 166.]

*Princess Royal, off Cadiz, 29th August 1798, Section 1.  
three quarters past 7 o'clock, P. M.*

Sir,

THE Right Honourable the Earl of St. Vincent K. B. admiral of the Blue, and commander in chief of his Majesty's ships in the Mediterranean, &c. having in my opinion acted unbecoming the character of an officer, by treating me in a manner unsuitable to my rank, between the 17th of May and 29th of August 1798, both days inclusive, I am to request you will be pleased to move their lordships of the Admiralty, to order a court martial to try the right honourable the Earl of St. Vincent, admiral of the Blue, and commander in chief in the Mediterranean, for having acted unbecoming the character of an officer, by treating me in a manner unsuitable to my rank, and contrary to the practice of the service, between the 17th of May and the 29th of August 1798, both days inclusive.

Be so good, at the same time, to assure their lordships, that necessity, and a sense of what I owe to the corps to which I belong, as well as my own credit and character, have alone induced me to adopt this unpleasant measure at the present moment.

I have the honour to be,

*Evan Nepean, Esq.*

J. ORDE.

*Princess*

*Princess Royal, off Cadiz, 29th August 1798,*

My lord, *half past 8 o'clock, P. M.*

MY feelings as an officer, together with other pressing considerations, have compelled me to write the inclosed letter to Evan Nepean, esq. secretary to the lords commissioners of the Admiralty, which I send open for your perusal, and must beg you to forward by the first opportunity.

I have the honour to be, &c.

*The Earl St. Vincent.*

J. ORDE.

These were returned to Sir John, between six and seven o'clock in the morning of the 31st, with the following note :

*Ville de Paris, before Cadiz, 30th Aug. 1798.*

Sir,

I HAVE not read the letter addressed to Mr. Nepean, secretary to the Admiralty, on his Majesty's service, nor shall I. If you think fit to close the seal, I will forward it in the first dispatch I send.

I am, Sir,

*Rear Admiral Orde, Bart.*

ST. VINCENT.

On receipt of this packet, Sir John wrote the following letter, and put it with a copy of lord St. Vincent's, given above, into a cover directed for Mr. Nepean, sealed and sent it by an officer to Lord St. Vincent; the delivery was reported by the officer on his return.

Sir, *Princess Royal, off Cadiz, 31st August 1798.*

I BEG you will acquaint the right honourable the lords commissioners of the Admiralty, that the letter I addressed

to you of yesterday's date, I enclosed unsealed to lord St. Vincent, with another to his lordship, a copy of which I send you, together with one of his lordship's, in answer, and have in compliance therewith, sealed my letter above alluded to, and sent it to his lordship to forward to you.

I am, Sir,

*Evan Nepean, Esq.*

J. ORDE.

*Letter from Rear Admiral Sir John Orde to Evan Nepean, esq. Blenheim, Tagus, 10th Sept. 1798.*

Sir,

BEFORE this reaches you, you will I trust have received a letter from me, requesting their lordships will order a court martial to try the right honourable the earl of St. Vincent, K. B. admiral of the Blue, commander in chief of his Majesty's ships in the Mediterranean, &c. for having acted unlike an officer, by treating me in a manner unsuitable to my rank and station, and contrary to the practice of the navy, between the 17th day of May 1798 and the 29th of August in the same year, both days inclusive. An application I must beg leave again to assure their lordships, made with great reluctance on my part, but from a full conviction of the necessity of the measure, as well for the preservation of my credit and character as for the general interest of the service. Section 2.

Be pleased, Sir, further to state to their lordships, that the conduct of the earl of St. Vincent towards me, at the very commencement of the above period, had become very extraordinary and exceptionable, but that I had decided to pass it over, if practicable, without too great a sacrifice, being unwilling to embarrass the service at that critical period, or to think unfavourably of an officer's intentions towards me, whom I had much esteemed, and who had more than once invited me to serve under his orders.

F f 4

That

That lately, however, his lordship had treated me in a manner, in my humble opinion, so unsuitable to the rank and station I hold in the fleet under his command, that, nearly cut off as I was by him from every common means of explanation and discussion, my letters to his lordship on material service sometimes returned unopened, at others passed without being either answered or noticed, and no mode for accounting for any part of my conduct that might have been, or might become objectionable to his lordship, allowed, although strongly and pointedly requested; my feelings and sense of duty to my corps would no longer permit me to bear such treatment in silence; when too, I received a most unmerited reprimand, with orders to quit the fleet, like a culprit, and embark on board a ship of the most inferior quality and condition, in it to proceed on a service of the lowest degree, when compared to the important one conferred on my junior on the station; the ship, captain, and several officers assigned for my flag by the admiralty, taken from me, after I had, with infinite trouble and expence assisted in getting the Princess Royal and her crew in excellent order, and had just accomplished the task.

It had been my constant study, I solemnly declare, since joining lord St. Vincent, to obey his commands, second his views, and give him the firmest support on all occasions, as, I will venture to say, I am able unequivocally to prove; and I had been so studious to avoid even the appearance of combination or conspiracy against his lordship, that I had for the purpose almost given up visiting other ships and inviting officers to the Princess Royal.

Enclosed I send you for their lordships' perusal, copies of several public letters that passed between lord St. Vincent and myself, from the 17th of May to the 31st of August (for, previous to the former period, we had been, I conceived,

conceived, on the best terms, and at the latter I parted from the fleet) from which, and the several memorandums, notes, &c. that connect them, their lordships will be enabled to judge in some degree of my ground of complaint, and to decide on what is proper to be done in a case, that I humbly consider, concerns the navy at large, as well as the credit, character, and interests of him who now claims protection and anxiously waits their decision.

I am, Sir,

Your obedient humble servant,

*To Evan Nepean, Esq.*

J. ORDE.

P. S. To the public letters are joined some private ones, which passed at the same time between lord St. Vincent and myself, as they appear to me necessary to give their lordships a fuller insight into the business in question, trusting, however, they will allow them to be considered as private; for, I must mention that lord St. Vincent had encouraged a private correspondence between us, which has consequently been carried on by me without caution, (although never I hope without due respect), confiding in his lordship's honour in so delicate an intercourse begun by himself, and even to be sufficient ground for a difference of opinion, justifying my acting as I have done in the business in question, without deserving the severe censure passed on my conduct by lord St. Vincent.

I am, Sir, &c.

*Evan Nepean, Esq.*

*Secretary to the Admiralty.*

J. ORDE.

*Letter*

*Letter from Evan Nepean, esq. to Rear Admiral Sir John Orde, bart. received on his arrival in the Downs.*

Sir,

*Admiralty-office, 10th October 1798.*

I HAVE received and communicated to my lords commissioners of the admiralty, your letter to me of the 29th August, in duplicate, setting forth that the earl of St. Vincent had, in your humble opinion, acted unbecoming the character of an officer, by treating you in a manner unsuitable to your rank, between the 17th day of May and the 29th of August, both days inclusive; and desiring I would move their lordships to order a court martial to try the right honourable the earl of St. Vincent, for having acted unbecoming the character of an officer, by treating you in a manner unsuitable to your rank, and contrary to the practice of the navy, between the 17th day of May 1798, and the 29th of August, both days inclusive; and I have their lordships commands to acquaint you, that having taken the same into their consideration, as also what you stated in your letter to me of the 30th of August, and 10th of September, on the same subject, they do not think proper to comply with your request.

I am, Sir, &c.

*To Rear Admiral*

EVAN NEPEAN.

*Sir John Orde, Bart.*

*Letter from Rear Admiral Sir John Orde, Bart. to Evan Nepean, Esq.*

Sir,

*Gloucester Place, Oct. 23, 1798.*

Section 4.

I HAD the honour of receiving your letter of the 10th October, signifying to me that their lordships did not think proper



proper to comply with my application for a court martial on the earl of St. Vincent. Their lordships are, I trust, already convinced, by my several communications, of my extreme reluctance, however sensibly affected by a treatment wholly unforeseen, and (as I hope I may venture to say) unmerited by me, to adopt the strong measure of requesting a court martial on my commanding Admiral, at such a moment as the present. Their lordships will have observed, that suffering both in mind and character, by the very injurious proceedings by which alone lord St. Vincent thought fit to mark his apparent displeasure with me, I made ineffectual attempts to obtain from his lordship some less severe explanation of the cause, for the humiliating exhibition of me in the eyes of the fleet (wherein their lordships had been pleased to assign me my post of service), as a *disgraced officer*, and as one unworthy of maintaining my station in it. I need not point out to their lordships, the extraordinary mode by which *alone* the admiral chose to notify his orders for my departure, *or the repeated refusal of an answer to my temperate representation of surprise and concern at my unexampled degradation*; or my wish, by opportunity of discussion, or other mode at his option, of accounting to his lordship for any part of my conduct which might have appeared objectionable to him, although I was utterly unconscious of any just ground whatever of imputation against it. I could not possibly suppose he was longer influenced in his determination for my removal by the nature of the remonstrance I had presumed to address to lord Spencer, upon the command given to my junior, Sir Horatio Nelson, because I had now communicated to him the answer with which his lordship had honoured me, and by which it was evident, that I had been far from soliciting my recall, and his lordship, far from deeming my continued service where I was unacceptable, and indeed it would originally

ginally have been difficult to have believed his lordship serious in his idea of my recall, or removal, as a necessary consequence of my having made this representation (*he having explicitly assured Sir William Parker, that he thought the preference given to Sir H. Nelson over his seniors a very hard measure, and such as should induce a strong remonstrance*) if he had not thought fit on a subsequent occasion to excite my regret for the step I had taken, by a remark upon the probable loss I had thereby incurred of the contingent command of the whole fleet. I could; therefore, only conceive that his lordship might have taken offence at my freedom of remonstrance against certain doctrines and practices, which he had suddenly promulgated, and peculiarly exercised against me, in the supposed discharge of my duty; and by which I not only felt myself aggrieved, but apprehended that an admiral, with an inferior flag, would have been thereby reduced to a state of insignificance, or even of dependance, on his own captain; with possible, and indeed probable, consequences of most dangerous tendency to his Majesty's service; and by which also an indefinite latitude of accusation and condemnation was claimed by the commander in chief, with the power of his absolute prohibition upon the person accused, to use, however guiltless he might (*perhaps* at least) be of the charge, any means of explanation, or endeavour to exculpate himself. My feelings of what I thought due to my own station, but much more my sense of the danger, and disgrace thus unjustly, as I conceived, hanging over the career and reputation of every subordinate officer in his Majesty's service, from the highest to the lowest, when under the command of a superior, made me at first venture to remonstrate with, and run a risk of giving a *momentary* umbrage to an admiral whose eminent talents and splendid conduct in his command I had admired, under whom I had been solicitous to serve, and  
whose

*whose approbation I had made it my earnest ambition and uniform study to deserve.*

Impelled by no motives of personal dissatisfaction against such a chief, I only hoped to gain from his more reflected consideration of the consequences of part of his own system, an alteration of great importance, not only to my own credit and comfort, but to that of the whole corps whose cause was thus in question. Here I had left the matter and myself, that no occasion could have ever again brought forward a necessity for revival of it. I deeply lament that I was mistaken; yet still my conscience tells me, that I justly disavowed any impulse of personal resentment, even under the severest sufferings from the aggravated harshness, which my humble remonstrance had appeared to have drawn upon me from his lordship, at the time of his ordering me to quit the fleet, and under the impossibility of relief from any other resource at such a moment, by *his total refusal to give any answer*. I at last, contrary to my decided meaning and wish, hardly prevailed upon myself to make an appeal in the way I did, to an authority whose peculiar competence to decide on points of naval discipline, might best avert the mischief which had injured me, and threatened, by the persevering severity I had witnessed, the welfare of the service, and even the safety of the individuals in it.

With such sentiments strongly impressed on my mind, I thought it more liberal and manly to take my part at once, by which I had an immediate opportunity of communicating it to lord St. Vincent himself, *and making him aware of my design*, than to reserve my complaint and charge till my arrival in England, although I should much have wished to have acted under their lordships more especial opinion and direction, and particularly in a case wherein their own authority seemed to be involved. Having thus presumed to trouble their lordships, as simply as I could,

with

with the account of my ideas and motives in this business, which, in obedience to my sense of duty, I set on foot, I do not mean, on this occasion, to call in question their lordships right to decline compliance with my application, or to object to their exercise of it. To them is best known, what sacrifices the present state of affairs requires; and they will appreciate the risk that might arise from a limited attention to the evils I represent. To their decision, I submissively bend, confident, however, that they will be pleased to substitute such other means as, *not liable to any personal inconvenience or interruption to service*, may speedily and effectually answer the great end I had in view, of preserving the naval service from alarming innovation, and of rescuing my own character and professional situation, now cruelly attacked and debased, from shame and ruin. The greatest part of my life has been devoted to the service of my country. I hope that I have done no discredit to it. I would wish to die in it, free from blame or just attain.

I am, Sir, &c.

*To Evan Nepean, Esq.*

J. ORDE.

Section 5.

*Letter from Evan Nepean, Esq. to Rear Admiral Sir John Orde, Bart.*

Sir,

*Admiralty Office, 2d November 1798.*

I HAVE received and communicated to my lords commissioners of the admiralty, your letter to me of the 23d ult. explaining for their lordships information the motives by which you had been influenced in your several representations respecting the conduct of the earl of St. Vincent, particularly on the occasion of his removing you from your station in the fleet under his orders.

And I have it in command from their lordships to acquaint you, they do not consider the reasons his lordship  
has

has assigned for sending you home, sufficient to justify the measure; and having already signified their opinion to him on that head, they do not think it necessary to take any farther steps on the occasion.

I am, Sir, &c.

Rear Admiral Sir J. Orde.

EVAN NEPEAN.

No. L. Admiral Sir Hyde Parker's Correspondence with the Admiralty, and Application for an Investigation on his Conduct in the Baltic.

[Referred to Vol. I. p. 219.]

Sir, Great Cumberland Place, 26th June 1801.

THE very sudden and unexpected manner in which the Lords Commissioners of the Admiralty have recently superseded me in the command with which I was intrusted, and the report that his Majesty's ministers have stated in the House of Commons, "that there were circumstances which might have arisen, after the thanks of that house had been given to me, for the action of the 2d of April, which might have induced his Majesty's ministers to recal me from my command, as well as to advise his Majesty to withhold from me any marks of his royal approbation," make it utterly impossible for me to refrain from expressing the consciousness which I entertain of the perfect rectitude of my own conduct, and my anxiety to have every part of it examined in the strictest manner, and in the fullest detail.

I confess, Sir, it is quite out of my power to conceive how the reason of my recal, as stated in your letter of the 21st of April, viz. "the difficulties you appear to entertain of carrying into execution the instructions which  
" you

"you had received from their Lordships," can, considering the nature of the case, be deemed a sufficient reason for that measure; still less how it can be thought a sufficient ground for withholding from me any marks of the royal approbation of my conduct on the 2d of April, for which I had the honour of receiving the very strongest testimonials from his Majesty and both Houses of Parliament, joined to those of their Lordships, and also those of a private nature from the first Lord.

With respect to the difficulties, or rather difficulty, referred to, in your letter of the 21st of April, and on which you state the ground of my recal to rest; it may be permitted me to observe, that it was suggested in a private and confidential letter to the first lord, on the 10th of April, with a view of its being kept as private as, in the judgement of the first lord, the interest of the public service might require; that the sole object of my suggesting it at all was, the being furnished with the means by which it might be surmounted; that it was one which did not, at the time, interfere in the smallest degree with the most active operations of the fleet under my command; that it was one of a distant, as well as of a doubtful nature; one against which I held it to be my bounden duty, to invite the care of the first lord to provide; and, lastly, one which the conduct of my successor has proved to have existed.

Honoured with the strongest approbation of his Majesty, of both houses of Parliament, and my Lords Commissioners of the Admiralty, for my conduct on the 2d of April; honoured equally with the approval of his Majesty's government, of the conclusion of the armistice with the court of Denmark, on the 9th of the same month; the merit of my conduct on neither of those occasions attempted to be, in the slightest degree, impeached; no charge whatever preferred against me for my subsequent conduct.

In

In this peculiar predicament, do I conceive my character is affected, by the report of what has passed in parliament; by the nature and manner of my recal from my command; and by all the marks of the royal favour having been withheld from myself, whilst they have been (certainly) most honorably and deservedly conferred on two junior flag officers serving under my immediate command.

In this situation, I feel it necessary to beg you, Sir, to lay before their Lordships, my earnest and anxious request, that they will be pleased to appoint a court of inquiry, to inquire into my conduct, from the 2d of April to the 5th of May, on which day I quitted my command.

In making this request to their Lordships, I feel confident, that they will not hesitate to accede to it, as a measure which is not more necessary for the quiet of my feelings, and the vindication of my character, than it is essential to the satisfaction of justice, the security of the honor of every British officer, and the general advantage of his Majesty's service.

I have the honor to be, Sir,

Your most obedient humble servant,

HYDE PARKER,

*Evan Nepean, Esq.*

Sir,

*Admiralty Office, 30th June 1801.*

I HAVE received, and communicated to my Lords Commissioners of the Admiralty, your letter of the 26th instant, desiring, for the reasons therein mentioned, that a court of inquiry may be held on your conduct, from the 2d of April to the 5th of May last, on which day you quitted your command; and, in return thereto, I have their Lordships commands to acquaint you, that, on a due considera-

tion of the circumstances, they do not think it proper to institute an inquiry into your conduct in the manner you have pointed out.

I am, Sir,

Your most obedient humble servant,

W. MARSDEN.

*Admiral Sir Hyde Parker,  
Town.*

Sir, *Great Cumberland Place, 7th July 1801.*

Section 2.

I HAVE received the honor of the letter of the 30th ultimo from Mr. Marsden, and, as my Lords Commissioners of the Admiralty have thought proper not to institute the inquiry into my conduct, as proposed in my letter of the 26th ultimo, I think it right to acquaint you, for the information of their Lordships, that it is my intention to make known to my friends the anxious wish which I have officially expressed for the institution of such inquiry.

I beg to assure you, that I am alone led to the adoption of this measure, from its appearing to me to be the only one which is now left me, of effectually removing any unfavourable impression, which circumstances may have created, relative to my conduct during the command with which I was lately intrusted.

I have the honor to be, Sir,

Your most obedient humble servant,

HYDE PARKER.

*Evan Nepean, Esq.*

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